

No. 17398

United States
Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

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ENERSEN,

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45 Polk Street,
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For Appellee.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 39371

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

PETITION FOR REMOVAL OF
CIVIL ACTION

Petitioner respectfully shows:

1. Petitioner is the defendant in the civil action commenced on August 17, 1960, in the Superior Court of the State of California in and for the City and County of San Francisco, No. 502869, entitled Joyce A. Harrington, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant.

2. Service of summons and complaint was made on defendant on August 19, 1960. Said complaint is the initial pleading setting forth the claim upon which the aforesaid action is based, and defendant first received a copy of said initial pleading in the aforesaid manner on August 19, 1960. The aforesaid summons and complaint, true copies of which are attached hereto and made a part hereof, constitute all of the process, pleadings, and orders served upon defendant in said action.

3. The plaintiff above named was at the time of the commencement of the said action, and still is, a resident and citizen of the State of California. The plaintiff was not at the time of the commencement of the said action and still is not a resident or citizen of the State of New York.

4. The defendant was at the time of the commencement of the said action and still is a corporation duly organized and existing under the laws of the State of New York. Defendant had at the time of the commencement of the said action, and still has its principal place of business in the State of New York. Defendant was not at the time of the commencement of the said action and is not now a citizen of the State of California.

5. The said action is a civil action over which this Court has original jurisdiction under 28 U.S.C. § 1332 and is one which defendant is entitled to remove to this Court pursuant to 28 U.S.C. § 1441(a), in that the matter in controversy exceeds the sum or value of \$10,000.00 exclusive of interest and costs and is between citizens of different states.

6. The defendant accompanies this petition with a bond with good and sufficient surety conditioned that the defendant will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this case was not removable or was improperly removed.

Wherefore, defendant prays that this Court accept this petition and bond, that the above action now pending against defendant in the Superior Court of the State of California in and for the City and County

of San Francisco, No. 502869, be hereby removed from said State Court to this Court, and that this Court proceed with the said action in accordance with law.

Dated: August 29, 1960.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Defendant, New York Life Insurance Company.

Duly Verified.

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 502869

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Defendant.

COMPLAINT FOR DAMAGES

(Breach of Insurance Contract)

Plaintiff alleges:

I.

At all times herein mentioned defendant New York Life Insurance Company, a Corporation, was,

and now is, a corporation duly organized and existing under and by virtue of the laws of a State unknown to plaintiff and, pursuant to authorization, transacting business in the State of California.

II.

Plaintiff is the widow of Arnold Harrington and is the named beneficiary of the benefits payable by the terms of the life insurance policies hereinafter referred to.

III.

Arnold Harrington died on February 5, 1960. At said time there were in full force and effect two policies of life insurance theretofore issued by defendant to said Arnold Harrington numbered, respectively, 25452964 and 26027201. The face value of policy 25452964 was \$10,000.00. The face value of policy 26027201 was \$5,000.00. Each of said policies included a double indemnity term which provided, in part, as follows:

“Double Indemnity Benefit

“This Company will pay to the beneficiary, subject to the terms and conditions of this policy, an additional amount (The Double Indemnity Benefit) equal to the face amount of this policy upon receipt of due proof that the Insured’s death resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within 90 days after such injury and before the earliest of the following:

“(1) expiration of the grace period following the due date of a premium in default;

“(2) the policy anniversary on which the insured’s age, nearest birthday, is 70;

“(3) maturity of this policy as an endowment or its surrender for cash value.”

IV.

The death of Arnold Harrington resulted directly, and independently of all other causes, from accidental bodily injury and such death occurred within 90 days after such injury and before the happening of any of the contingencies referred to in the double indemnity term heretofore alleged.

V.

Thereafter plaintiff made proof to defendant of the death of Arnold Harrington and that said death occurred as hereinabove alleged but said defendant has at all times refused, and now refuses, to pay any sum upon either policy save and except for the single benefit payable under each, to wit, \$10,000.00 on policy 25452964 and \$5,000.00 on policy 26027201.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of \$15,000.
2. For her costs of suit.
3. For other and further appropriate relief.

Dated: August 16, 1960.

ALLAN BROTSKY,
CHARLES W. DECKER,

By CHARLES W. DECKER,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed August 17, 1960, Superior Court.

Received August 25, 1960.

[Title of Superior Court and Cause.]

SUMMONS
(General)

The People of the State of California,

To the above-named Defendant(s):

You are hereby directed to appear and answer the complaint of the above-named plaintiff(s) filed in the above-entitled court in the above-entitled action brought against you in said court, within Ten days after the service on you of this summons, if served within the above-named county, or within Thirty days if served elsewhere.

You are hereby notified that unless you so appear and answer, said plaintiff(s) will take judgment for any money or damages demanded in the com-

plaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Dated: Aug. 17, 1960.

[Seal] MARTIN MONGAN,
Clerk.

By D. E. DUNN,
Deputy Clerk.

Received August 25, 1960.

[Endorsed]: Filed August 29, 1960.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT NEW YORK LIFE
INSURANCE COMPANY

Comes now the defendant New York Life Insurance Company and for its answer to the complaint admits, denies and alleges:

First Defense

1. Answering the allegations of paragraph I of the complaint, defendant admits and alleges that it is now and was at all times mentioned in the complaint a corporation duly organized and existing under the laws of the state of New York, having its principal place of business in the state of New York, and pursuant to authority, transacting business in the state of California.

2. Answering the allegations of paragraph II of the complaint, defendant admits that plaintiff is the widow of Arnold Harrington and named as beneficiary of the policies of life insurance referred to in paragraph III of the complaint. Defendant denies that any further benefits are payable by the terms of said policies.

3. Answering the allegations of paragraph III of the complaint, defendant admits that Arnold Harrington died on or about February 5, 1960; that at said time there were in full force and effect two policies of life insurance theretofore issued by defendant to said Arnold Harrington numbered, respectively, 25452964 and 26027201; that the face amount of policy 25452964 was Ten Thousand Dollars (\$10,000.00) and that the face amount of policy 26027201 was Five Thousand Dollars (\$5,000.00). Defendant alleges that policy 25452964 included a double indemnity term which provided:

“Double Indemnity Benefit

“The Company will pay to the beneficiary, subject to the terms and conditions of this policy, an additional amount (the Double Indemnity Benefit) equal to the face amount of this policy upon receipt of due proof that the Insured’s death resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within 90 days after such injury and before the earliest of the following:

“(1) expiration of the grace period following the due date of a premium in default;

“(2) the policy anniversary on which the Insured’s age, nearest birthday, is 70;

“(3) maturity of this policy as an endowment or its surrender for cash value.

“However, the Double Indemnity Benefit will not be payable if such death results from (a) suicide, whether sane or insane, or (b) war, declared or undeclared, or any act incident thereto, or (c) travel or flight in any kind of aircraft (including falling or otherwise descending from or with such aircraft in flight) while the insured is participating in aviation training in such aircraft, or is a pilot, officer or other member of the crew of such aircraft; nor will such benefit be payable if such death is caused or contributed to by bodily infirmity, or any illness or disease other than a bacterial infection occurring in consequence of an accidental injury on the exterior of the body.

“These Double Indemnity Benefit provisions will not apply to any insurance provided under the Non-Forfeiture provisions nor to any dividend additions which may be credited under this policy. These Double Indemnity Benefit provisions will not affect tabular cash values under this policy.

“Upon receipt by the Company within thirty-one days of any premium due date of the Owner’s written request accompanied by this policy for appropriate endorsement, these Double Indemnity Benefit provisions will be terminated as of such premium due date.

“Any premium due under this policy on or after the policy anniversary on which the Insured’s age, nearest birthday, is 70 or prior termination of these Double Indemnity Benefit provisions will be reduced by the amount included for these provisions.”

that policy 26027201 contained a double indemnity term which provided:

“Double Indemnity Benefit

“The Company will pay, subject to the terms and conditions of the policy, an additional amount (the Double Indemnity Benefit) equal to:

“(1) the death benefit provided under (a) on the first page of this policy upon receipt of due proof that the Insured’s death resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within ninety days after such injury and before the policy anniversary on which the Insured’s age, nearest birthday, is 70;

“(2) the death benefit provided under (b) on the first page of this policy upon receipt of due proof that the death of the Insured’s wife resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within ninety days after such injury and before the premium reduction date.

“However, no Double Indemnity Benefit will be payable on account of the death of any person which occurs after surrender of this policy for cash value or expiration of the grace period following the

due date of a premium in default or which results from (i) suicide, whether sane or insane, or (ii) war, declared or undeclared, or any act incident thereto, or (iii) travel or flight in any kind of aircraft (including falling or otherwise descending from or with such aircraft in flight) while such person is participating in aviation training in such aircraft, or is a pilot, officer or other member of the crew of such aircraft; nor will such benefit be payable on account of any death that is caused or contributed to by bodily infirmity, or any illness or disease other than a bacterial infection occurring in consequence of an accidental injury on the exterior of the body.

“Any Double Indemnity Benefit payable on account of the death of the Insured will be paid to the beneficiary for the death benefit provided under (a) on the first page of this policy, and any Double Indemnity Benefit payable on account of the death of the Insured’s wife will be paid to the beneficiary for the death benefit provided under (b) on the first page of this policy.

“These Double Indemnity Benefit provisions will not apply to any insurance provided under the Non-Forfeiture provisions nor to any dividend additions which may be credited under this policy. These Double Indemnity Benefit provisions will not affect tabular cash values under this policy.”

Defendant denies each of the remaining allegations of paragraph III.

4. Answering the allegations of paragraph IV of the complaint, defendant admits that the death

of Arnold Harrington occurred within 90 days after the injury which caused said death, and before the happening of any of the contingencies set forth on lines 9 through 13 of page two of the complaint. Defendant denies each of the remaining allegations of paragraph IV of the complaint.

5. Answering the allegations of paragraph V of the complaint, defendant admits and alleges that plaintiff submitted to defendant a form entitled "Proofs of Death—Claimant's Statement" in which plaintiff represented the cause of death of Arnold Harrington to have been "accidental shooting;" that defendant paid to plaintiff the single indemnity benefits of policies 25452964 and 26027201 in the sums of \$10,104.17 and \$5,033.66, respectively; that defendant has declined to pay double indemnity benefits under said policies for the reason and upon the grounds that the death of Arnold Harrington did not result directly and independently of all other causes from accidental bodily injury within the meaning of the double indemnity provisions of said policies. Defendant denies each of the remaining allegations of paragraph V.

Second Defense

6. The death of Arnold Harrington did not result directly and independently of all other causes from accidental bodily injury within the meaning of the double indemnity provisions of policies 25452964 and 26027201.

Wherefore, defendant prays that plaintiff take nothing against defendant and that defendant have its cost of suit and such other relief as to the Court may seem proper.

Dated: October 11, 1960.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Defendant New York Life Insurance Company.

Certificate of Service by Mail attached.

[Endorsed]: Filed October 11, 1960.

[Title of District Court and Cause.]

MEMORANDUM FOR JUDGMENT

This is an action for double indemnity benefits in the amount of \$15,000 under two policies of insurance issued by the defendant, New York Life Insurance Company, to Arnold Harrington, the deceased, as insured. The single indemnity life insurance benefits under the policies have already been paid to Mr. Harrington's widow and the beneficiary, Joyce A. Harrington, the plaintiff in this action, and there is no dispute concerning those benefits.

Mr. Harrington was fatally injured by a self-inflicted gunshot wound on February 5, 1960, and died the same day. This action was commenced on August 17, 1960, by the filing of a complaint in the Superior Court of the State of California, in and for the City and County of San Francisco. On August 29, 1960, the action was removed to this Court by defendant, pursuant to the provisions of 28 U.S.C. § 1441(a). This Court has jurisdiction of the action under the provisions of 28 U.S.C. § 1332.

The sole issue in the case is whether the death of Arnold Harrington “resulted directly, and independently of all other causes, from accidental bodily injury * * *” within the meaning of the double indemnity provisions of the policies. The plaintiff submitted appropriate proof of death in which plaintiff represented the cause of death to be “accidental shooting.” In its answer defendant has declined to pay the double indemnity benefits. There is also lurking in the record under this defense (though not vigorously made) the suggestion by the defendant that the death was the result of suicide and therefore excluded under the double indemnity provisions of the policies. The parties agree that this case is controlled by the California law on the subject, since the contracts of insurance were issued in California, and the incident, which is the subject of this suit, occurred in California.

The facts, which are practically undisputed, are as follows:

Mr. Harrington, the insured, was a laboratory technician by occupation and was thirty-eight years old. He was married to the plaintiff herein, and as the issue of that marriage there were five children living in the home, the eldest being age eleven. He was happy in his occupation, which at the time of his death was bringing him an income from \$1,000 to \$1,200 per month. His financial condition was relatively good, in that other than secured obligations for payments on his home and automobile, and current living expenses, all of which were currently in good standing, he had no financial obligations. His health and the health of his family were good, with the exception that he had an ulcer which was in a controlled condition. His family relationship appeared to be a happy one. There is no history of suicidal threats or tendencies. He had a hobby of collecting guns. Mrs. Harrington was fearful of guns, and did not participate in her husband's hobby. At the time of his death he was the owner of a number of rifles and hand guns of various types, among them the German Mauser semi-automatic pistol with which he fired the fatal shot. Mr. Harrington fired his guns frequently at a firing range, was quite familiar with them, was an expert shot, and prided himself upon his knowledge of guns. On the day of his death Mr. Harrington had been home from work with an adverse reaction to a flu shot, and he had a minor quarrel with his wife concerning her overstaying a visit with a girl friend. Mr. Harrington had been drinking, but did not appear to be intoxicated. The quarrel continued and

Mr. Harrington left the house in anger, returning approximately an hour later. Upon his return Mrs. Harrington refused to make up with her husband or to reply to him. At that time present in the room was the oldest child, a son aged eleven. Mr. Harrington, saying words to the effect that he might as well do something he enjoyed, started handling the Mauser semi-automatic pistol. The pistol was loaded with one shell in the barrel, or firing chamber, and eight or nine shells in the magazine. He was causing the gun to make a clicking noise. According to the evidence this could have been done in one of three ways, all of which involved causing the hammer to be released from a cocked or semi-cocked position to firing position, while the safety lever was on safe. The safety mechanism on the gun was so designed that even though the hammer dropped toward the firing pin it would not strike the firing pin while the safety lever was in the safe position. After a number of clicks Mrs. Harrington requested him to stop, saying in substance "Please don't do that, you know it makes me nervous" or "you know it's dangerous," to which Mr. Harrington replied that the gun was safe, and "see, I'll show you." Whereupon he placed the gun to his head and the gun fired, causing the gun shot wound through his head which caused his death shortly thereafter.

There was expert testimony concerning the condition of the gun and the operation of its mechanism. The significant factors are that there was little, if any, probability that the gun would fire when the

safety lever was in the position of safe, one witness saying the chances were a million to one, and that this was so regardless of how the hammer was released; that the only way the gun could be fired was when the safety lever was in a fire position; that as a matter of general safety practice with respect to firearms it was "dangerous" to point a firearm loaded, or unloaded, with the safety on, or off, at any vital part of the body. Under these circumstances the Court finds:

(1) That the death was produced by a gun shot wound, which was caused by the voluntary act of the deceased;

(2) That deceased knew the gun was loaded, but he thought the safety lever was in a safe position and that the gun would not fire in that condition, and, further, that the gun could be pointed at his head safely in the condition;

(3) That at the time of the firing the safety lever of the gun was in the fire position, but that this condition was unknown to and unexpected by the deceased; and

(4) That the deceased had no intention to take his own life.

Under these facts plaintiff contends that death occurred from "accidental bodily injury," and defendant contends that as a matter of law death could not have so occurred because the act of pointing a loaded gun at his head by the deceased was either

suicidal or so inherently dangerous that death followed as a foreseeable consequence.

While defendant suggests that the conduct of the deceased might have been suicidal, the main thrust of its argument is based upon the proposition that the death was non-accidental because of the performance of a dangerous act from which death was a foreseeable consequence. Defendant's reluctance to strongly urge that the death was the result of a suicidal act is confirmed by the evidence. Other than the minor family quarrel which occurred on the day of the shooting, there was no factor in Mr. Harrington's life which either directly or indirectly supports the inference that he intended to take his own life at the time of the shooting, or at any other time. Such factors as his condition of health, his financial status, his family status, and his mental condition, are all negative on the question of suicidal intent. The act of pointing a loaded gun, which he thought was safe, at his head, which might be characterized as foolish or dangerous, under the circumstances in which it occurred in this case is not suicidal. Plaintiff, therefore, has carried the burden that the death was not the result of suicide.¹

¹In its brief defendant asserts that the burden of showing that death was not the result of suicide was on the plaintiff, citing *Zuckerman vs. Underwriters at Lloyd's*, 42 C. 2d 460 (1954). If defendant's assertion is the holding of the *Zuckerman* case plaintiff here has met that burden. It is unnecessary for this Court to determine whether or not the *Zuckerman* case so holds.

See: *Wilkinson vs. Standard Acc. Ins. Co.*, 180 C. 252; *Canada Life Assurance Co. vs. Houston*, Cir. 9, 1957, 241 F. 2d 523.

The other portion of the defendant's contention raises a more difficult question, namely, whether under the circumstances of this case the non-suicidal death was caused by accidental bodily injury. In this situation it is the duty of this Court to determine what the courts of last resort of the State of California would hold under the facts of this case. In *Young vs. Aeroil Products Co.*, Cir. 9, 1957, 248 F. 2d 185, the court said at page 188:

“Preliminarily, it should be noted that the law of California governs the substantive issues in this case. It was in that state that the machine was purchased and used and where the fatal accident occurred. It is our limited duty to discern the substantive law of California on the issues in controversy and to apply it accordingly. Our task is not to innovate, but to imitate. Where the course of the law remains uncharted, as is the situation with several of the issues in the instant case, it is the duty of the Federal court to examine germane precedents and analogous decisions in California and to endeavor to ascertain from those decisions how the California courts would decide the case at bar. In the absence of direct authority, we must heed such guideposts as the state courts have constructed, for even here true allegiance to principle of *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64, 58 S.Ct. 817,

82 L. Ed. 1188 precludes unrestrained and independent determination in a diversity case.”

There are a number of California cases dealing with the interpretation of insurance policies which provide for death payments as the result of accidental deaths. Careful research by counsel and by the Court fails to disclose any California case which closely resembles this case on its facts and it would be difficult to say with certainty what the California courts would hold under these circumstances. The California cases seem to make a distinction between insurance policies which insure against accidental death, and a death caused by accidental means, holding that those policies which insure against death from accidental means require proof not only “that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to injury or death.” *Rock vs. Travelers’ Ins. Co.*, 172 C. 462.

There is a suggestion in later California cases that this distinction no longer is valid. *Cox vs. Prudential Ins. Co.*, 172 C.A. 2d 629, 637. See also: *Zuckerman vs. Underwriters at Lloyd’s*, 42 C. 2d 460, 473. In any event the distinction is of no moment in this case, because the policy in this case insured against death from accidental bodily injury, and would fall in the “accidental results” type of case as distinguished from the “accidental means” type of case, the latter requiring a greater quantum of proof. It is the conclusion of this Court that the

proof in this case is sufficient to establish that death resulted from accidental bodily injury under either standard.

This conclusion is based upon the definition of "accidental" as that term is used in accident insurance policies. The earliest California case dealing with the definition of this word in the context of insurance cases is *Richards vs. Travelers Ins. Co.*, 89 C. 170, where the court said:

"It is impossible to give a precise definition of the word 'accidental.' As every effect has a cause, there is one sense in which nothing is accidental.

"Accident policies are of recent origin, and there have been only a few judicial decisions with respect to them. But the authorities to be found on the subject seem to be to the point that 'accident' must be given its popular meaning; that is, a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. The fullest discussion of the subject is to be found in the opinion of the United States circuit court for the district of Michigan, in the case of *Ripley vs. Railway Company*, 2 Bigelow's Life & Acc. Ins. Cas. 738. In that case the insured had been attacked by highwaymen, and killed, and it was contended that as the highwaymen intended violence, there was no accident. The learned judge (Withey, J.), in delivering the opinion of the court, says: 'Perhaps, in a strict sense, any event which is brought about by design of any person is not an

accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptation, "accident," if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event * * * I think, in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called accident. The company fix the terms of the contract, and are to be held, in the absence of plain unequivocal exceptions and provisions, to intend what, in popular acceptation, the insured party is likely to understand by its terms.' In that case judgment went for defendant upon another point, and was affirmed by the United States supreme court, where the meaning of 'accident' was not discussed (16 Wall. 336); but the language of Judge Withey seems to us to express correct views of the question." (89 C. 175-176.)

This definition, "a casualty—something out of the usual course of events, and which happens suddenly

and unexpectedly, and without any design on the part of the person insured," has been repeated often in the many California cases which have subsequently dealt with the problem. Some of these cases are *Price vs. Occidental Life Ins. Co.*, 169 C. 800, 802; *Rock vs. Traveler's Insurance Co.*, *supra*; *Rooney vs. Mutual Benefit H. & S. Ass'n.*, 74 C. A. 2d 885, 888; *Zuckerman vs. Underwriters at Lloyd's*, *supra*; and *Cox vs. Prudential Ins. Co.*, *supra*. The essence of defendant's position is that the deceased invited death by engaging in conduct so inherently dangerous that death was the foreseeable result. In support of its position defendant cites *Postler vs. Traveler's Ins. Co.*, 173 C. 1, overruled on other grounds in *Zuckerman*, *supra*, *Price vs. Occidental Life Ins. Co.*, *supra*, and *Eraldi vs. No. Am. Acc. Ins. Co.* (N.D. Cal. 1937), 20 F. Supp. 735. In all of these cases the deceased started an altercation, which resulted in the death of the deceased caused by a shot from a gun fired by the other person to the altercation. In each of these cases the court held that in a case where the deceased invited death from a deadly weapon in the hands of another person the killing was a natural and probable consequence of his own voluntary act, and not an accident. In *Postler*, *supra*, the court said:

"The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts.

In *Western Commercial Travelers' Assn. vs. Smith* (85 Fed. 401, 405, [40 L.R.A. 653, 29 C.C.A. 223]), the court said that 'an effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it * * *' (See also, 4 Cooley's Briefs on Insurance, p. 356; *Fidelity etc., Co., vs. Stacey's Exrs.*, 143 Fed. 271, [6 Ann. Cas. 955, 5 L.R.A. (N.S.) 657, 74 C.C.A. 409]; *Price vs. Occidental Ins. Co.*, 169 Cal. 800, [147 Pac. 1175]; *Rock vs. Travelers' Ins. Co.*, 172 Cal. 462 [156 Pac. 1029]; *Hutton vs. State Accident Co.*, 267 Ill. 267 [Ann. Cas. 1916C, 577, L.R.A. 1915E, 127, 108 N.E. 296]; *Prudential Casualty Co. vs. Curry*, 10 Ala. App. 642 [65 South. 852].) In *Price vs. Occidental Life Ins. Co.*, we had occasion to deal with a situation somewhat similar to the one before us. The insured had been killed by the discharge of a revolver held in the hands of another person. It was held that 'if it should appear that the killing had been the result of an encounter with deadly weapons, and that the deceased had himself invited and brought on such conflict, the fatal result would not have been accidental so far as he was concerned.' The decision of the United States circuit court of appeals in *Taliaferro vs. Travelers' Protective Assn. of America* (80 Fed. 368, [25 C.C.A. 494]), was cited with approval. There the court upheld a directed verdict in favor of the in-

surance company, it appearing that the insured had invited another to a deadly encounter which had resulted in his killing. Under the undisputed facts, we do not see how the case at bar can be taken out of the principle of those just referred to. Postler, after arming himself and declaring his intention of getting back his money, had gone to the gambling-house and had there undertaken to compel the payment of one thousand dollars at the point of a pistol. While he was engaged in this effort, an encounter took place between him and one of the men who was in the place when he arrived. In the course of this encounter he was killed.

“A man who attempts to obtain money from others by the display of a deadly weapon, aiding such display by threats of killing, must contemplate, as the natural and probable consequence of his actions, that there will be resistance to or interference with the consummation of his plan, and that such resistance or interference will be likely to result in armed conflict and serious injury to one or more of the participants. To all intents and purposes, Postler’s position, so far as concerns the probable consequences of his acts, was that of any man who attempts robbery at the point of a firearm. If such a man were killed by his intended victim, it could hardly be claimed that his death was caused by ‘accidental means,’ in the sense in which those words are used in policies like the ones before us. We are not suggesting that, from an ethical standpoint, Postler’s action was to be judged by the

standards which would be applied to the commission of an ordinary robbery. The conditions under which he had lost his money in gambling may have been such as to make him feel, whether rightly or wrongly, that he was justified in resorting to extreme and lawless measures in the effort to recoup his losses. But these considerations do not affect the ultimate question, which is whether the killing was the natural and probable consequence of his own voluntary acts. Under the authorities above cited, this question must be answered in the affirmative.” (173 C. 4-5.)

Plaintiff’s position is that death in this case was accidental because it was the unexpected and unforeseeable result of a voluntary act, and plaintiff urges that, although the deceased’s voluntary act of pointing a loaded gun at his head was both dangerous and unnecessary, death was the result of the deceased’s mistaken belief that the safety lever of the gun was in a safe position, and that, therefore, the gun would not fire.

In support of her position plaintiff cites a number of cases, among which are *Cox vs. Prudential Ins. Co.*, *supra*, and *Rooney vs. Mutual Benefit H. & S. Ass’n*, *supra*. In both of these cases the deceased had placed himself in a position of peril by a voluntary act of his own. In *Cox*, *supra*, the deceased had deliberately and voluntarily jumped out of a moving vehicle in which he was being transported as a prisoner by law enforcement officers, and was killed by a following vehicle. In *Rooney*, *supra*, the

deceased started a fist fight, and was knocked to the ground and killed by striking his head against the sidewalk. Both of these cases are subsequent in time to the California cases cited by the defendant. Both quote from the case of *Losleben vs. Cal. State L. Ins. Co.*, 133 C.A. 550, 556, with approval:

“While an injury to an insured person may result in greater or less degree from an original voluntary act upon his part, if there is some evidence which justifies the inference that the means which produced the injury contained something of an unexpected or unforeseen character involving other acts not intentionally done, the resulting injury may be said to be caused through accidental means.” (133 C.A. 556.)

In *Rooney*, *supra*, it is said:

“The rule in California is that each case must stand upon its own facts and that the legal principles enunciated as to what constitutes ‘accidental means’ as distinguished from ‘accidental result’ must be applied to such facts as appear in the particular case. These principles, applied to the facts of this case, do not support appellant’s claim that when one invites a fistic encounter and sustains injury or death therefrom recovery cannot in any case be had upon policies of the character here involved. To prevent a recovery upon such a policy, it must be made to appear that in utilizing the means to which he resorted the insured knew or should have known that he would probably sustain the in-

jury which resulted as a consequence thereof.” (74 C. A. 2d 890.)

These more recent California cases seem to teach that, even though death may be the result of a voluntary act of the deceased in which the deceased started in motion a perilous course of conduct, death may be accidental where there is some act or occurrence in the course of conduct which is unanticipated and unexpected by the deceased, and from which it cannot be said reasonably that death was the natural or probable consequences of such conduct. The cases are not clear on where reasonable foreseeability ends and the unexpected begins, but seem to leave that question to the facts of each case.

Here the facts would seem to support the conclusion of accidental death rather than death as the foreseeable result of a dangerous or perilous course of conduct. It does not require expert opinion to establish that it is dangerous or perilous to point a loaded gun at one's head in the parlance of general safety practices in the handling of firearms. However, this does not mean that every death which results from the performance of such conduct is not an accident. If, as expert testimony showed here, the gun had a safety mechanism which reasonably could be anticipated to prevent firing, and consequently death, when properly used, then it cannot be said that death was the foreseeable result of pointing the loaded gun if the one pointing the gun thought, and had good reason to believe, that the gun was in that condition. The conduct of the deceased here could be called foolish, stupid, danger-

ous, perilous, unnecessary and many other characterizations of a similar import, but in the context of the surrounding circumstances it would require a strained appraisal of the facts to say that what occurred was not unexpected and unforeseen by him. Before he pointed the gun at his head he had been doing the same unsafe, mechanical manipulation with the gun by causing the hammer to be released toward the firing pin with the safety lever in a safe position without firing the gun. His announced purpose for putting the gun to his head was to demonstrate the safety of the gun in that condition. It was his mistaken belief that the gun was safe which produced the unexpected occurrence. It can be argued with some degree of plausibility that the deceased should have foreseen what probably happened here, namely, that somehow, in the manipulation of the gun he inadvertently moved the safety lever from a safe position to a fire position just before putting the gun to his head. In other words, should he have anticipated the mistake which caused his death? The answer is that in the common understanding an occurrence which happens as the result of a mistake is usually an accident. When weighing probabilities in this area the courts seem to require some element of certainty of the end result by the means used, without the intervention of some act or occurrence of an unexpected nature, such as a mistake, before holding that death is a foreseeable consequence. Here the end result of death would not have occurred but for the mistaken and unexpected condition of the gun. The Court, therefore, concludes

that death in this case resulted directly from accidental bodily injury.

Defendant has cited a number of cases from jurisdictions other than California which are not supported by the weight of authority in California, or are distinguishable on their facts. These cases are *Kinavey vs. Prudential Ins. Co. of Am.*, Pa. 1942, 27 Atl. 2d 286 (doing acrobatic stunts on the rail of a bridge while intoxicated); *Allred vs. Prudential Ins. Co. of Am.*, N.C. 1957, 100 S.E. 2d 226 (a fourteen year old boy killed as the result of laying down in the middle of a highway to show how brave he was); *Ford vs. Standard Life Ins., Co.*, Tenn. 1947, 12 C.C.H. Life, Health and Accident Cases 789 (handling a venomous snake under the religious belief he could handle such snakes without harm); *Thompson vs. Prudential Ins. Co. of Am.*, Ga. App. 1951, 66 S.E. 2d 119 (playing a form of "Russian roulette"); and *Baker vs. National Life & Acc. Ins. Co.*, Tenn. 1956, 298 S.W. 2d 715 (permitting a person to shoot at a can on the insured's head). There should be added to the cited cases *Trivette vs. New York Life Ins. Co.*, Cir. 6, 1960, 283 F. 2d 441 (shooting self with pistol). What was said in *Cox*, *supra*, seems apropos here:

"Appellant cites several other cases in support of its contention that the death was not caused by accidental means. Those cases are factually distinguishable from the present case. It may be stated generally that in those cases the death was the direct result of the voluntary act of the insured

(such as jumping from a high building or the top of a moving train) and no act of an intervening agency was involved; or that the death resulted from performing a daredevil stunt (such as handling a rattle snake, playing Russian Roulette, or permitting a person to shoot at a can on the insured's head); or that the death resulted from fighting with guns." (172 C.A. 2d 638.)

There are outside cases which seem to support plaintiff. See: *Aetna Life Ins. Co. vs. Kent*, Cir. 6, 1934, 83 F. 2d 685; and *Peppers vs. Sovereign Camp, W.O.W., Ga. App.* 1936, 187 S.E. 215.

During the course of trial defendant objected to and moved to strike certain pre-death conversations by deceased and statements by plaintiff made shortly after the occurrence. The Court admitted the evidence and reserved ruling on the objections and motions to strike. The objections are overruled, and the motions denied. At the conclusion of the plaintiff's case defendant moved to dismiss on the ground that the evidence, as a matter of law, did not establish that death occurred from accidental bodily injury within the meaning of the two insurance policies in question. Ruling was reserved. The motion to dismiss is denied.

Prior to the taking of evidence plaintiff requested the right to amend the pleadings to conform to proof on the question of interest. Plaintiff should forthwith present her proposed amendment, so that final judgment can be prepared and entered after the question of interest is determined.

Judgment is awarded plaintiff in the amount claimed, subject to the determination of the question of interest. Under the provisions of Rule 52(a) F.R.C.P. the findings and conclusions in this memorandum shall constitute the findings of fact and conclusions of law of the Court, except on the issue of interest, and counsel for plaintiff is directed to prepare and present a judgment in accordance herewith after the determination of the question of interest.

Dated: March 31, 1961.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed March 31, 1960.

[Title of District Court and Cause.]

AMENDMENT OF COMPLAINT TO CONFORM TO EVIDENCE ON ISSUE OF INTEREST

Plaintiff herewith amends her complaint to conform to the evidence adduced at the trial of the above cause by adding thereto the following paragraph VI and altering the prayer as indicated below.

VI.

That plaintiff forwarded to defendant a form entitled "Proof of Death-Claimant's Statement" in which plaintiff informed defendant that the cause of the death of Arnold Harrington was accidental shooting; that defendant received said Proof of

Death on February 16, 1960; that thereafter on May 3, 1960, defendant addressed the following letter to plaintiff:

“May 3, 1960.

“Mrs. Joyce A. Harrington,
“716 Spruce Avenue,
“South San Francisco, California.

“Dear Mrs. Harrington:

“Policies 25 452 964
26 027 201

“Arnold L. Harrington, DB923 156

“With respect to your claim for Double Indemnity Benefits under policies 25 452 964 and 26 027 201, the Company has made a careful investigation as to all the circumstances surrounding your husband's unfortunate death. As a result, we must take the position that since he voluntarily engaged in an act so inherently dangerous that his death could be readily foreseen and expected as a natural consequence, it did not result from accidental bodily injury within the meaning of the Double Indemnity Provisions of these policies.

“The Company, therefore, denies any liability beyond the single indemnity amounts already paid to you under policies 25 452 964 and 26 027 201.

“Sincerely yours,

“/s/ ALEXANDER F. CHAPPELL,
“Associate Claims Consultant.

“AFC:cg”

that at no time following receipt of said Proof of Death did defendant request plaintiff to provide further or more detailed information of the circumstances surrounding the death of Arnold Harrington.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of \$15,000.00, together with interest thereon at the rate of seven per cent per annum from February 16, 1961.
2. For her costs of suit.
3. For other and further appropriate relief.

Dated: April 6, 1961.

ALLAN BROTSKY,

CHARLES W. DECKER,

By /s/ CHARLES W. DECKER,

Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 14, 1961.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSION OF LAW ON ISSUE OF INTEREST

The above-entitled cause having heretofore been submitted for decision, and the Court having set

forth its findings of fact and conclusions of law in its Memorandum for Judgment previously filed herein but having expressly withheld its findings of fact and conclusion of law on the issue of interest, and the plaintiff having thereafter, with leave of Court, amended her complaint to conform to the evidence on this issue, the Court now makes its findings of fact and conclusion of law on this issue as follows:

Findings of Fact

That on February 16, 1960, defendant received from plaintiff proof that the death of Arnold Harrington resulted directly and independently of all other causes from accidental bodily injury in the form of a "Proof of Death-Claimant's Statement" in which the cause of said death was stated to be accidental shooting; that thereafter defendant conducted an investigation of the circumstances surrounding said death; that on May 3, 1960, defendant denied its liability to pay said double indemnity benefits to plaintiff because said death did not result from accidental bodily injury; that at no time following February 16, 1960, did defendant request plaintiff to furnish it further or more detailed information about the circumstances surrounding the death of Arnold Harrington; that the contracts of insurance sued upon provide for payment of said double indemnity benefits upon receipt of due proof that the insured's death resulted directly and independently of all other causes from accidental bodily injury.

Conclusion of Law

That plaintiff is entitled to interest at the rate of 7% per annum on the sum of \$15,000.00 from February 16, 1960, until paid.

Dated: April 14, 1961.

/s/ OLIVER J. CARTER,
Judge.

[Endorsed]: Filed April 14, 1961.

In the United States District Court for the North-
ern District of California, Southern Division

No. 39371

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial on March 20, 1961, before the above-entitled court, Honorable Oliver J. Carter, Judge presiding, and the parties having each waived trial by jury, and said cause having proceeded to trial before the Court sitting without a jury, and the Court having heard the evidence adduced by both parties, and the argument of counsel, and the cause

having been submitted for decision, and the Court having heretofore filed herein its Memorandum for Judgment which said Memorandum constitutes the findings of fact and conclusions of law of the Court except on the issue of interest, and the Court having thereafter made and filed herein its finding of fact and conclusion of law on that issue——

It Is Hereby Adjudged:

1. That plaintiff recover from defendant the sum of \$15,000.00 together with interest thereon at the rate of seven per cent per annum from February 16, 1960 until paid.

2. That plaintiff recover from defendant her costs of suit.

Dated: April 20, 1961.

/s/ OLIVER J. CARTER,
Judge.

Approved as to Form.

MORRIS M. DOYLE,
RICHARD MURRAY,
McCUTCHEN, DOYLE,
BROWN & ENERSEN,

Attorneys for Defendant, New York Life Insurance
Company,

By /s/ RICHARD MURRAY.

[Endorsed]: Filed April 20, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that New York Life Insurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 21, 1961.

Dated: April 28, 1961.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Defendant, New York Life Insurance Company.

[Endorsed]: Filed April 28, 1961.

In the United States District Court for the Northern District of California, Southern Division
No. 39372

JOYCE A. HARRINGTON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE CO.,

Defendant.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

CHARLES A. DECKER, ESQ.

For the Defendant:

MESSRS. McCUTCHEON, DOYLE,
BROWN & ENERSEN, by
MORRIS M. DOYLE, ESQ.,
RICHARD MURRAY, ESQ.

March 20, 1961—2:00 P.M.

The Clerk: No. 39371, Joyce A. Harrington v. New York Life Insurance Co., for court trial.

Mr. Decker: Ready for the plaintiff.

Mr. Murray: Ready.

The Court: Do you desire to make an opening statement, Mr. Decker?

Mr. Decker: Yes, sir.

The Court: All right, you may make it. And if you desire to make an opening statement, Mr. Murray, you may make it at the end of Mr. Decker's statement or you may reserve it until time for the defense case.

Mr. Murray: Thank you, your Honor.

Mr. Decker: May it please the Court, as indicated in the memoranda which have been submitted to the Court by counsel, this is an action by the beneficiary of two policies of life insurance which, as admitted in the pleadings, were in full force and effect at the time of the death of the insured.

The insured, Arnold Harrington, died on February 5, 1960. It is also conceded by the pleadings that the plaintiff in this action, Joyce A. Harrington, is Mr. Harrington's widow and the beneficiary under both of the policies.

The Court: Well, what was that? I want to follow that, now. [4*]

Mr. Decker: It is admitted in the pleadings, sir, that plaintiff in this case is the beneficiary under both the policies.

The Court: Well, it's one person, though?

Mr. Decker: That's right.

The Court: It is the widow, Joyce Harrington, who is the beneficiary?

Mr. Decker: That is right, sir.

Both of these contracts of insurance had provisions for double indemnity payment in the event that the death of the insured resulted directly and independently of all other causes from accidental bodily injury. And so the question before the Court as posed by the pleadings is, one, did Mr. Harrington's death result directly and independently of all other causes from accidental bodily injury, as that term is used in the contracts of insurance.

The Court: Does this go to only one feature of the policies, that is, the double indemnity side of it?

Mr. Decker: That is right, your Honor.

The Court: So far as the—what term do you use to describe the base sum, if I may use that term, of the policy? There is no dispute about that? It has been paid?

Mr. Decker: It has been paid, yes. No dispute about that at all.

As I have indicated in my trial memorandum, I think [5] and I submit, there is a subsidiary issue of fact in the case, and that is, did the defendant

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

insurance company receive due proof that the death resulted from accidental bodily injury and, if so, when. And, as I have indicated in my memorandum, the reason that I think that is an issue of fact is that under the case law in California, if the beneficiary did in fact submit such due proof, then she is entitled to interest on the amounts of the double indemnity at the rate of seven per cent per annum from the date the company received such proof.

The Court: Is this a contested issue?

Mr. Decker: It is contested at this point, your Honor, perhaps because the defendant has not really had an opportunity to plead to it, because in the complaint there is no specific request for interest. There is no prayer for interest.

The Court: Well, what do you want to do about it?

Mr. Decker: Well, as indicated in my memorandum, I have noted that in the complaint there is an allegation that due proof was made, and in the answer there is an admission that a form of proof was received, but there is no admission that due proof was received.

The Court: Yes, because the defendant denies liability, period.

Mr. Decker: Yes.

The Court: And whatever proof was filed [6] was insufficient to require that the double indemnity be paid.

Mr. Decker: That is correct, sir.

The Court: So that's the way the matter arises, by that denial, or is there an allegation that there

was not proper proof of loss or proof of death, if you may use that term—I don't know which is appropriate in this case—to require that any payment be made? I take it that that's not so because they paid off as to the base amount of the policies.

Mr. Decker: That's right, sir. I think it arises on the basis of the allegation in the complaint that due proof was made and the denial in the answer that due proof was made.

The Court: Well, is interest a matter that has to be specially pleaded?

Mr. Decker: I don't think so. I haven't researched this point, but——

The Court: Well, I am talking about the interest you are claiming. I am not talking about the interest after judgment, that flows from the judgment. I am talking about interest prior to judgment.

Mr. Decker: I understand that, and the only answer I can give you at this point on that, your Honor, is that there is a California case which is cited in my memorandum where interest was allowed, although not prayed for, by way of amendment of the judgment. [7]

The Court: Well, I assume you could amend your pleadings to conform to the proof if you wanted to wait until that time, or you could, under Rule 15, move to amend your pleadings right now.

Mr. Decker: I had contemplated amending to conform to proof.

The Court: Rule 15 has to be broadly interpreted. Having had one of my judgments reversed

for failure to do this one time, I am very conscious of this problem.

The only thing that occurs to me, Mr. Decker, is that, mentioning it now, are you under a duty to give notice as quickly as you can by filing your proposed amendment, so that the defendant's probability of being prejudiced would be lessened? I frankly don't know. I am merely raising the question and I will leave it to you. I know you could approach this problem by proposing to amend to conform to the proof or you could approach it by proposing to amend now.

Mr. Decker: I could propose to amend now if I had a written amendment ready to file with the Court, which I do not have.

The Court: Well, you proceed as you desire.

Mr. Decker: I have given notice to the defendant by providing him with a copy of the plaintiff's pretrial memorandum, which raises this point which I am discussing with the Court now. [8]

The Court: Yes.

Mr. Decker: In any case, I think that this is a subsidiary fact issue and will attempt to meet my burden as I go along on this question of fact.

Now, here, your Honor, is what I think the evidence will show, and I think that there is very little likelihood that there is going to be any serious conflict in the evidence as to matters of fact:

It will show that the plaintiff in this case, Joyce Harrington, was married to Mr. Harrington years ago, shortly after the conclusion of World War II, and after they had met in China. He at that time

was a member of the armed services and she was an employee of the same laboratory where he worked.

The Court: Is there going to be any argument about marriage?

Mr. Decker: None. This is purely by way of background.

The Court: Mr. Murray, is there any problem in this? Can we stipulate to that?

Mr. Murray: No, your Honor, we don't contest that.

The Court: You are just giving this for background?

Mr. Decker: That is right, your Honor.

The Court: All right. Go ahead. When you come to the place where issues will be contested, will you call it [9] to my attention?

Mr. Decker: Yes, your Honor.

The Court: You may give the background, certainly, on uncontested matters. I didn't mean to imply that.

Mr. Decker: All right.

The Court: I was maybe anticipating, and rather than do that I will let you call that to my attention.

Mr. Decker: All right, your Honor.

The Court: Proceed, Mr. Decker.

Mr. Decker: The marriage occurred there and they came to this country, and within a very short time they took up residence together here in San Francisco and lived here together until this tragedy

of February 5, 1960. There were five children born to this marriage, all of whom are alive today.

Mr. Harrington was a laboratory technician, and he initially, when he came into civilian employment, was employed by a physician out at Stonestown here in San Francisco and later became employed at St. Luke's Hospital, where he became the Chief Laboratory Technician and he was so employed at the time of his death.

In addition to his work as a laboratory technician, he had two hobbies, one of which was gun collecting. The other was radio equipment. He was a ham radio operator.

Over the course of the years he collected [10] several guns, and it was his custom and habit to occasionally inspect the guns and clean them. He was certainly thoroughly familiar with all of them. And also about once a week he would take his—along toward the last year or two, in any case—would take his oldest boy, Arnold, Jr., to the pistol range and they would fire the guns.

In view of the holding in the Zuckerman case, which indicated that part of the plaintiff's burden of proof in a case of this kind it is incumbent upon the plaintiff to, in effect, negative suicide. I would point out as a part of the preliminary statement in this case and a part of the proof which I intend to adduce, that the evidence will show that Mr. and Mrs. Harrington lived happily together; that both of them were in good health and the children were in good health; that there were no financial problems; that they had recently purchased the home

which they were residing in at the time this accident occurred, a very pleasant, comfortable, clean, well furnished home in South San Francisco; that Mr. Harrington had never threatened to take his own life; that he was not a despondent or difficult person.

But, nonetheless, on February 5th, 1960, the following transpired:

On that day Mr. Harrington had suffered a slight illness, apparently caused by reaction which he had to a flu shot, so although it was a workday he did not go to work that [11] day. Instead, in view of the fact that he was at home to look after the children if they needed caring for, Mrs. Harrington took the day off and she went to visit a friend of hers. The arrangement was that she was to call home and arrange for her husband to come and get her by 4:00 o'clock in the afternoon, or some time like that, but she overstayed her leave and didn't call him to come and get her until about 6:00 o'clock. He was understandably provoked and when he did come to get her he chided her about this, but they returned to their home on Spruce Street in South San Francisco.

At this time Mr. Harrington had already eaten, as had the children. He had fed them. So Mrs. Harrington took a meal herself, and some time thereafter Mr. Harrington left the house.

I should say that perhaps at this point on, your Honor, is where there may be some conflict in the evidence on matters of fact, although I don't think so.

Mr. Harrington returned to the house and came into the living room where he poured himself a drink, or had the older boy, Arnold, Jr., mix it for him—I am not sure exactly what the evidence will show on this—and he sat on the living room couch in the living room of the house and began to clean his most recently acquired gun, a German Mauser pistol. He had a piece of chamois cloth which he was using in cleaning this gun. He had asked his wife if she didn't want to make [12] up, and she was sitting at the other end of the couch and she was unwilling to talk to him or even look at him. So eventually he stood and walked over to a position directly in front of her where she was seated on the couch and near the end of the coffee table which sat in front of the couch.

At this point he had been for some time causing the gun to make a snapping noise, and he continued that while he was standing there in front of her. The evidence will show that at this point she said to him something like this, "Don't do that, Harry. You know it makes me nervous," and his reply was something to this effect, "There is nothing to make you nervous. There is nothing to be nervous about. It is perfectly safe." And with that he put the gun up to his temple and the gun discharged and he fell dead at her feet.

At the time this happened the oldest boy, Arnold, Jr., was seated within a matter of a few feet of Mrs. Harrington. He was doing his homework.

The Court: How old is the boy?

Mr. Decker: At that time he was eleven.

The Court: Is he going to be a witness in this case?

Mr. Decker: Yes, he will be.

The Court: What problems are we going to have of management insofar as this experience?

Mr. Decker: Well, his deposition has been taken. At the request of the defense, he was made available for a [13] deposition, and it was at this time that we faced this problem and it didn't turn out as badly as we thought it might, and the mother has given her permission to use him as a witness if I consider it will be of assistance to the Court.

The Court: Well, this is a difficult situation for all parties.

Mr. Decker: That's right.

The Court: The only thing I want to occur is to have the shock and the incidental aspects of this matter—or maybe I shouldn't say incidental. I mean the collateral aspects of it which may have some rather drastic effect—I want to have that cut to a minimum if I can.

Mr. Decker: Well, I think I am going to reserve my decision as to whether or not I call him as a witness. I will call him if I think it's indicated, and this will depend somewhat on how the trial goes.

The Court: The only reason I mentioned this is that I expect counsel to use good taste, both plaintiff and defendant. I think that I must take cognizance of the problem. It is going to be difficult enough, I imagine, for Mrs. Harrington to go through the testimony concerning the incidents, but I presume that, being an adult, she is more condi-

tioned to going through this. And if it cannot be helped as far as the Court is concerned, because it is part and parcel of the lawsuit itself, and she is seeking the relief of the [14] courts and therefore this is one of the things she must do.

But with a child who would be a witness, and who is not a beneficiary directly, and who has not sought the relief of the courts, I think that here my discretion is involved, and I am going to try to keep the problem, insofar as the child is concerned, to a minimum.

I don't mean to say that I am issuing any order or command that you don't do it. I just want you to use your best judgment for the purpose of protecting the child insofar as whatever traumatic result may come from having to be a witness in this kind of a lawsuit. And I will say to you, and Mr. Murray as well, that I want to try and keep the collateral results to a minimum, if I can. But I don't mean to imply that you shall not do one thing or another. I will just have to exercise my judgment as we go along. If I see the matter getting out of line, I am going to restrict the questioning in that area.

But I don't expect that I will have to do that because I am sure both of you gentlemen understand the problem as well as I, and I am sure that you are equally desirous of not causing any more difficulties in this area than is absolutely necessary in order to accomplish the over-all objective of getting the proper testimony before the Court.

Mr. Decker: Your Honor, I think I cannot only

speak for myself but also for Mr. Murray on this subject, and we [15] both are very much concerned about it, and we will make every effort to avoid causing the boy or anybody else any severe effects as a result of what we call upon them to do.

In any case, your Honor, following this incident, the evidence will show that Mrs. Harrington got the children all away from the scene and then, knowing what had happened, called the police, who reported quickly, and we will call officers to testify as to what they observed when they got there.

The evidence will further show that Mr. Harrington died at 11:55 p.m. that very evening at St. Luke's Hospital as a result of his gunshot wound.

That is all of my opening statement.

The Court: Do you desire at this time to make an opening statement, Mr. Murray?

Mr. Murray: Well, your Honor, I had originally intended to make an opening statement. However, since the case is being tried by the Court, I think Mr. Decker has stated the factual outline sufficiently to let the Court know where we are going, and I believe our legal position is perhaps clear in the memorandum which we filed.

The Court: Well, to put it rather loosely, but to get the fact issues that are before me narrowed down as much as I can, I would like to ask both you and Mr. Decker to indicate to me that the main issue, I take it, is whether or [16] not this was an accidental death as described by the policy or, to put it the other way, whether it was a death brought

on by the hand of the deceased, which would be, in the parlance of the streets, classified as suicide.

Mr. Murray: No, your Honor, I think the question is broader than that. Of course, if suicide were the cause of Mr. Harrington's death, that would be the end of the case.

The Court: Yes.

Mr. Murray: But we also think the law is when a man courts danger, so to speak, and voluntarily and needlessly performs an act which a prudent man would recognize as highly dangerous, then his death when it occurs is not accidental. We think this is the law, your Honor, and this is our primary position, and the cases we have cited in our brief bear out that position.

The Court: Then let's put it this way so I will understand it: Your contention will be that the plaintiff has the burden of proving that this death was an accidental death, as that term is used in the policy?

Mr. Murray: That's right.

The Court: And that the evidentiary showing here will not carry that burden, and that you don't affirmatively have to establish that this was a suicide. If it was, this would dispose of the matter, but it could be something less than a suicide but an act on the part of the deceased which would [17] not qualify as an accidental death under the policy.

Mr. Murray: That's right, your Honor.

The Court: I don't know whether it is the Zuckerman case you are talking about, although I don't know that that is so——

Mr. Murray (Interposing): No, your Honor; in this matter I am not——

The Court: No, I was talking to Mr. Decker. Mr. Decker mentioned the Zuckerman case. I just recollect having recently read of the case involving somewhat a similar factual situation. I don't know that it is a California case. I think it is a federal case that arises out of some District or Circuit Court that has come down within the last six months, at least, which has a somewhat substantially similar factual background, whether or not a self-inflicted wound by gunshot was accidental or was in the nature of a suicide, or one that wouldn't qualify as an accidental death.

Mr. Murray: Perhaps that's the Trivette case, your Honor?

The Court: Could be. I don't remember the name of it. I am going to have to go back and look through some of the cases. It could very well be. You may keep up on these much more closely than I do. All I remember is having read one which sounds something like this one, in which there was a verdict—I think there was a jury verdict in that case— [18] sustained. The holding was sustained that this was accidental. But it was a question of fact that had to be decided.

Now, I don't mean to say that that should determine the question of fact here, just merely sustaining one which came out of a similar background. I think it occurred in one of the other Circuits than the Ninth Circuit. But I will just have to go back and search the headnotes of the advance sheets

and see if I can discover the case. I merely mentioned that because if there are cases which shed any light on the problem I would like to have you familiar with them.

The other thing is, I take it this is a diversity of citizenship case and that I am applying the laws of the State of California in applying the contract.

Mr. Murray: It is a diversity case and I believe your Honor is correct.

Mr. Decker: That is my view, your Honor.

The Court: All right, then, the California cases which go to contract interpretation and the substantive law of the State of California on contract interpretation apply here, and we will have to determine what that is and attempt to apply it to the facts.

Are there any other procedural questions that should be called to my attention—or any procedural questions? I have one in mind that appears to be indicated about the admissibility of the testimony of the deceased. This, of course, [19] is always a question where the statements of the deceased person are involved, the basic rule being against statements of deceased persons unless there is some exception to the rule, because this could be a hearsay statement.

I notice that this has been raised in the trial memorandums. I presume you are prepared to present your arguments on that matter. I haven't had a chance to research it, and I don't know whether any of these—what should I say—similar type cases have discussed that evidentiary problem. I remem-

ber back to my law schools days that some of these statements that were made just prior to death—the one I remember is Delverno's stabbing (?), and that was admissible, I know, and just after he was stabbed, why——

Mr. Decker (Interposing): Well, of course, that is a dying declaration.

The Court: Yes, I understand that, and this is not a criminal case and therefore the dying declaration doesn't apply. But there are similar rules in the civil cases.

Mr. Decker: I take it, your Honor, that in view of the fact that we are trying the case before the Court, sitting without a jury, even these evidentiary problems shouldn't hold us up. I am prepared——

The Court (Interposing): No, Mr. Decker. The only thing I say is, if it is a matter of some moment in time—that is, you have to hear a lot of material and then discard [20] it—I would have to make a judgment as to whether I would have to hear the motion argued now and dispose of it or let it go ahead.

Now, I am well aware of the fact that you can hear the testimony subject to objection and motion to strike and then rule on it. I am not a strong advocate of straining out error after it is in the record. But you don't have the same problems that you would have before a jury. I recognize that. I certainly would try to get the question isolated so it can be viewed without prejudice. I simply will have to face that problem when I come to it.

I merely mention it because I take it that is going to be one of the problems. Now, are there others of

a similar nature so I can start my research on it right away?

Mr. Decker: None that I know of, your Honor.

The Court: Do you have any, Mr. Murray?

Mr. Murray: No, your Honor.

The Court: And is that one going to be—have I stated the question properly?

Mr. Murray: Well, your Honor, I think that the testimony is hearsay testimony and we will regard it as objectionable.

The Court: Well, you are going to stand on that point. I don't know what the answer to the question is. I do know there are exceptions to the rule, and if this testimony comes [21] within one of the exceptions to the rule, of course, it may be offered into evidence, and the federal rule favors admissibility under Rule 44—or maybe it is 43, too; also, Rule 43. Rules 43 and 44 are taken together. I know, and favor admissibility.

All I want to do is to get in my mind the questions and to be able to rule on them as promptly as I can. I hope I may be able to rule on it when we get there, but you gentlemen may get to it before I have a chance to research it.

Mr. Decker: I can state my position on it very quickly and give you the authorities that I rely on, Judge, when we get to it.

The Court: Well, I don't believe you have outlined that question in your trial memorandum.

Mr. Decker: No, your Honor, I didn't anticipate it.

The Court: Well, then, all right, we will meet

with that problem. As soon as you can give me the authorities—if you want to give them to me now so that my law clerk can take them down, why, I will start some checking into the matter.

Mr. Decker: All right, your Honor. My authorities are predicated upon what was said in the deposition by Mrs. Harrington as to what her husband said when this occurred.

The Court: Well, it is substantially as you have outlined it? [22]

Mr. Decker: Substantially as I have outlined it. Now, if that is the evidence, it is obvious the statement of her husband is not a statement which we are offering for the purpose of proving that the fact asserted is a fact. We are offering it only for the purpose of showing the state of mind of the deceased at that particular moment, and under those circumstances it's not hearsay at all because we are not concerned with the fact asserted in the statement, namely, that "the gun is safe." We are concerned in this case with this man's state of mind. Did he think the gun was safe or not? That's the issue.

The Court: Well, can that be proved by a hearsay statement?

Mr. Decker: If it is offered for the purpose of showing his state of mind, it can be, and the authorities are found in Witkin's Book on Evidence at Pages 242-243. And also you will want to look at the discussion in Witkin at Page 232 on this subject.

The Court: Is there not—I simply don't know

whether it is present or not, but is there going to be any argument that this would be a part of the *res gestae* type of exception?

Mr. Decker: That's the so-called verbal act.

The Court: Yes.

Mr. Decker: It is not my understanding of the law that this is properly within that phase. If something exciting [23] had occurred, or something of that kind, his spontaneous declaration in response to that would be the spontaneous declaration.

The Court: Well, that's the point.

Mr. Decker: But that is not contended for here.

The Court: I was just interested as to whether or not it was because it is an unusual occurrence, and whether or not it falls within that rule is something that would——

Mr. Decker (Interposing): Well, you see, all that had happened up until the time he said this was, he had been snapping this gun.

The Court: Well, but anybody familiar with guns—it was my uncle, who was an old mountaineer, who says, “It is the unloaded gun that kills.” This was drilled into me from the time I was a child. I come from rifle country.

Mr. Decker: Well, my point is, though, that up until the time he said this nothing like an automobile accident, for example, or somebody getting killed, up to this time hadn't happened, so I don't think there is any great exciting event to create the exception to the hearsay rule.

The Court: Oh, I am not going to try to argue

the case for you. I was just asking you if it was there.

Mr. Decker: I don't think so.

(Simultaneous colloquy by Court and counsel.)

The Court: Well, you are going to present intent and [24] frame of mind, and, of course, I want to see those cases and I may want some more research on that. But we will take a look at your cases and then you cited some in your memorandum.

Mr. Murray: Not on this point, your Honor.

The Court: Not on this point. You have raised the point, though.

Mr. Murray: That is right.

The Court: Well, do you have any authorities you want to cite now, Mr. Murray?

Mr. Murray: No, your Honor. No, I haven't at this time.

The Court: Have you any comment to make concerning the so-called frame of mind testimony as it results from the declarations of the deceased person?

Mr. Murray: Well, your Honor, I think that the testimony is hearsay, whether it is designed to establish the condition of the gun or the state of mind of the decedent. If it is the state of mind of the decedent which is relevant, why, of course—(inaudible to the reporter). I think it is a self-serving statement and a hearsay one.

The Court: It is a hearsay statement, no question about that. The question is whether it comes

within the exception to the hearsay rule. Whether or not it is self-serving may or may not be so. I don't know that. As I understand it—— [25]

Mr. Decker (Interposing): Any hearsay is self-serving. You add nothing to it by saying it's self-serving. Hearsay is hearsay.

The Court: But I don't know that it is a self-serving situation. The self-serving, as I understand it, is a statement made by a person who is one of the litigants to serve his own purpose, not the person who is the third party.

Mr. Decker: Don't you think that phrase arose to distinguish hearsay statements which were inadmissible from hearsay statements which were admissible because they were admissions? An admission against interest is admissible, even though hearsay. As opposed to that are hearsay statements which are self-serving.

The Court: But against whom? The witness or the party?

Mr. Decker: Well, the admission, of course, has to be against the interest of a party or it's not admissible.

The Court: Well, is Mr. Harrington a party to this action?

Mr. Decker: No. I don't see that the word "self-serving" helps us any.

The Court: Well, I raised the question. I don't know that it does either.

Mr. Murray: Your Honor, I set no great store by the word "self-serving." [26]

The Court: I do think that it's a hearsay state-

ment, and unless it falls within one of the exceptions to the hearsay rule it is inadmissible. If it falls within one of the exceptions, it's admissible. And that is whether it is self-serving or whether it isn't self-serving. That's my basic view of it. If you gentlemen think otherwise, I would like to hear about it.

But, in any event, I raised the question preliminarily for my own information so I can start research into the question and see if I can't have that one disposed of so that we can proceed with the case. I know we will proceed anyway, but I want to be as prepared as I can for the evidentiary questions.

Now, are there any other evidentiary questions? I take it there are none.

All right. Thank you, gentlemen.

Mr. Murray: Your Honor, I would like to say one more thing.

The Court: Yes, go ahead.

Mr. Murray: Our basic position in this case, your Honor, and the reason I mention it is so that your Honor can hear the evidence with it in mind, is that when a man performs an act which is reckless and dangerous in the extreme, then we think, under the cases that we cited in our brief, and as a matter of law, that the death is not [27] accidental. This is a question entirely apart from whether or not he intended to commit suicide.

The Court: That I understand. I understand that if it does appear to be suicide you won't resist that because that is conclusive, but if it is some-

thing short of that but still does not qualify as an accidental act which brought about death as set forth in the policy, you are not foreclosed from showing it.

Mr. Murray: That is right, your Honor. And we think the facts of this case which are undisputed will show that as a matter of law death was not accidental.

The Court: Well, that's the one I want to test. As I see the problem, then, actually, speaking about suicide is not the important argument. The argument is whether or not the conduct that will be described by the evidence will fulfill the qualification that it must have produced death accidentally by some accidental act.

Mr. Murray: That is one of the questions, your Honor.

The Court: Well, that is the question, isn't it?

Mr. Murray: Whether it was accidental within the meaning of the policy, that's right.

The Court: Well, you claim it isn't and you are not too much concerned about whether it is suicide. If it is, you have no quarrel with it, but you just say it falls short of accidental. [28]

Mr. Murray: That's right. By whatever theory.

The Court: And your burden is to establish that it was accident as that term is used in the policy, isn't that right?

Mr. Decker: That is right, your Honor. I am sure you understand I differ from counsel as to what the test is.

The Court: Well, yes. I am not asking you to concede anything.

Mr. Decker: Because in putting on my case I will be following my theory as to what the law is.

The Court: Why, surely. The only thing is, I hope that if your theory is correct, is it this, an argument about what the law is?

Mr. Decker: Yes, it is.

The Court: And not an argument about what the facts are?

Mr. Decker: That is correct. Counsel and I are pretty much in agreement that it is a question of law you are faced with in this case.

The Court: Can you stipulate as to the facts?

Mr. Murray: Well, your Honor, I think the facts are important in providing the framework and the background.

The Court: Why, I am sure they are.

Mr. Decker: I will tell you why we can't, your Honor. The question as to whether or not this was an accident within [29] the meaning of the policy is a matter that can only be determined by circumstantial evidence. The decedent is not here to tell us what his state of mind was. It can only be gathered by the circumstances.

The Court: Well, can you stipulate as to what the circumstances were?

Mr. Decker: Well, some of the circumstances are the appearance of the wife, the appearance of the little boy. There are some circumstances here that cannot be stipulated to.

The Court: You mean how I would weigh their testimony?

Mr. Decker: Yes, how the trier of the fact would——

The Court: If I interpret the evidence one way, the question will be determined as a matter of law one way; and if I interpret the evidence another way, it will be determined as a matter of law the other way; is that the point?

Mr. Decker: Yes, I think that is correct.

The Court: All right. Then if I have to weigh evidence I will have to do that. But you almost had me in the frame of mind that this was going to be an uncontested matter as to what happened, and the question was purely a question of what was the law in view of a stipulated state of facts.

Mr. Murray: Your Honor, our position, I think perhaps diverges just a bit from Mr. Decker's. We think that the [30] undisputed evidence will show as a matter of law that the death was not accidental, if your Honor accepts our view of the law, and we think our view of the law is the law, in view of the law established by the cases.

The Court: All right. Well, Mr. Decker is not required to accept that.

Mr. Decker: No. As a matter of fact, this issue is posed very sharply in our brief, your Honor.

The Court: Yes, I know the argument is there. The only point I am getting at is, can we narrow the facts down to a bare minimum so I can get to this question of law. I haven't researched what the law is on it. I have just read a few cases on the

subject as I go along. I have heard about this problem and I know it is in this area, where there is a self-inflicted wound that produces death, there is usually an argument about it.

It may or may not be by gunshot. It may be by other means. This isn't the only cases of this kind that has occurred in the history of insurance policies.

Mr. Decker: Not by a long shot. There are a lot of them.

The Court: The law books have quite a number of them, with variations on this same theme. So I presume I will have to find out what I presume the evidence to show before I can determine which principle of law to apply. [31]

Mr. Decker: I think that's right, your Honor.

The Court: Although Mr. Murray takes the position that, under the uncontested facts, I will have to, as a matter of law, take the view that there is no liability here.

Mr. Murray: I think that according to plaintiff's view of the evidence there is no liability as a matter of law.

The Court: All right. Thank you.

Will you proceed?

Mr. Decker: Will you take the stand, please, Mrs. Harrington?

JOYCE ANTONIA HARRINGTON

called as a witness in her own behalf, being duly sworn, testified as follows:

The Clerk: Please state your full name to the Court.

The Witness: Joyce Antonia Harrington.

The Court: Now, before we proceed, Mrs. Harrington, if at any time these proceedings become distressing to you or if there is any problem, just ask for a period of time and we will take a recess. We will proceed calmly. I just want to make it as easy as possible in terms of getting this story. I want the accurate story, but we will proceed in accordance with your desires insofar as your comfort or discomfort are concerned.

The Witness: Thank you, your Honor.

The Court: All right, Mr. Decker, will you proceed? [32]

Direct Examination

By Mr. Decker:

Q. Your name is Joyce A. Harrington?

A. Yes.

Q. And, Mrs. Harrington, you are the widow of Arnold Harrington? A. Yes.

Q. Where do you live?

A. 716 Spruce Avenue, South San Francisco.

Q. Are you employed?

A. Yes, by the Bank of America.

Q. And what do you do there?

A. I am a teletype operator.

(Testimony of Joyce Antonia Harrington.)

Q. Where did you get your education, Mrs. Harrington? A. In China.

Q. How far did you go in school?

A. I went two years of junior college and a year at the University of St. John's.

Q. I take it you were born in China?

A. Yes, I was.

Q. How old are you? A. I am thirty-five.

Q. Mrs. Harrington, under what circumstances did you meet your husband?

A. I was employed by the Navy laboratory in China. [33]

Q. Where in China? A. In Shanghai.

Q. When was this? A. This was in '46.

Q. 1946? A. Yes.

Q. Was he also employed there?

A. He was in charge of the laboratory.

Q. Was this a naval installation?

A. Yes.

Q. Was he in the Navy at the time?

A. Yes, he was.

Q. Do you know whether he had been married before?

A. He had been married once before, but it was a very short marriage and it was terminated within two months or thereabouts.

Q. Do you know when Mr. Harrington was born? A. Yes. On September 23rd, 1921.

Q. And so to recapitulate, when you met him in 1946 he would have been what? Twenty-five years old? A. Twenty-six, I believe.

(Testimony of Joyce Antonia Harrington.)

Q. I see. Had you been married before, Mrs. Harrington? A. No.

Q. You had not. What was his rating in the Navy at that time? [34]

A. He was First Class Pharmacist's Mate.

Q. Do you know whether he had been—whether he had seen active service where he had been accustomed to using guns?

A. Yes, he was in combat in Italy, China, Africa, and I don't think he saw combat in India, but he was there.

Q. I see. How far had Mr. Harrington gone in school, if you know?

A. He went to junior college in Maquoketa, Iowa.

Q. And, by the way, is that where he was from?

A. Yes. He was born there.

Q. What was the date of your marriage to Mr. Harrington? A. March 9, 1947.

Q. In Shanghai? A. Yes.

Q. And how long did you reside together in Shanghai following your marriage?

A. Eight days.

Q. Then what did you do?

A. We came directly to San Francisco.

Q. How long had you known Mr. Harrington before you and he were married?

A. About a year.

Q. And you came with him to San Francisco?

A. Yes. [35]

Q. Where did you go from there?

(Testimony of Joyce Antonia Harrington.)

A. To Maquoketa, Iowa.

Q. Did Mr. Harrington remain in the Navy following your marriage? A. Yes, he did.

Q. How long? A. Until 1951.

Q. And where all was he stationed during that period from 1947 to 1951?

A. At 50 Fell Street, Twelfth Naval District, in San Francisco.

Q. I see. So following his leave after overseas service he came back to San Francisco where he was stationed at the Fell Street Dispensary?

A. Yes.

Q. You and he lived together here in San Francisco, then, during that period?

A. Yes, and South San Francisco.

Q. In South San Francisco. What was his job at the naval installation on Fell Street?

A. Laboratory work.

Q. I gather from what you have said that he did not re-enlist, or he left the service in 1951.

A. Yes.

Q. What did he do then? [36]

A. We went to Panama.

Q. How long did you stay there?

A. Two months.

Q. Was he employed there?

A. Yes, by the United Fruit Company.

Q. In what capacity?

A. Also in the laboratory research.

Q. And you went with him? A. Yes.

Q. Were there any children by this time?

(Testimony of Joyce Antonia Harrington.)

A. There were two children and one on the way.

Q. I see. How many children do you have, Mrs. Harrington? A. I have five children.

Q. Mr. Harrington is the father of them all?

A. Yes.

Q. What are their names?

A. Arnold Harrington, Jr., Sylvia, Frances Ann, Terry Lee, and Kim.

Q. And where are the children now?

A. Two of my oldest children are with me and three of the younger ones are in Maquoketa, Iowa.

Q. With your husband's parents?

A. With my husband's parents, yes.

Q. I see. You remained in Panama some two months? A. Yes. [37]

Q. Then what did you do?

A. We came back and he worked for Dr. Beare. He continued working for him.

Q. Who is Dr. Beare?

A. He was my husband's employer before we left for Panama.

Q. Had he been stationed at the Fell Street installation, too? A. No, he is a civilian doctor.

Q. Oh, I see. Where is Dr. Beare's office?

A. At present he is at Stonestown Medical Building.

The Court: Is he a medical doctor?

The Witness: Yes.

The Court: Was this in connection with his practice or was he doing research?

The Witness: No, he is a general practitioner.

(Testimony of Joycé Antonia Harrington.)

The Court: A general practitioner and your husband was a laboratory technician for him?

The Witness: Yes, sir.

Q. (By Mr. Decker): I take it from what you have said that while your husband was still stationed here and employed by the Navy at Fell Street he was doing work, extra work, sort of, for Dr. Beare?

A. Yes, he was. He had a part-time job with Dr. Beare before he left the Navy.

Q. I see. Then did that job become full time before you [38] left for Panama, as you have testified to? A. Yes.

Q. So he worked for Dr. Beare full time for a while? A. Yes.

Q. Before he took the United Fruit job?

A. Yes.

Q. And after two months in Panama he returned and resumed his employment with Dr. Beare, is that correct? A. That is right.

Q. Now, how long did he work full time for Dr. Beare after coming back from Panama?

A. I don't know the exact time, but it was over a year, and he went over to St. Luke's then.

Q. So he worked approximately a year or thereabouts for Dr. Beare at Stonestown?

A. Well, first at Lakeside Medical Manor and then they moved to Stonestown.

Q. I see. And then he left that employment and became employed at St. Luke's Hospital?

A. Yes.

Q. Do you remember the year that he started his

(Testimony of Joyce Antonia Harrington.)

employment there? A. No, I don't.

Q. When your husband first started to work for St. Luke's what was his job there? Was he an assistant or was [39] he the chief laboratory technician?

A. No, he was just one of the laboratory crew.

Q. One of the crew? A. Yes.

Q. And later on did his job change?

A. Yes; because of his advanced knowledge, he was to become chief technician.

Q. How long did he work there before he became chief technician?

A. I don't quite remember.

Q. How long had he been chief technician there before he died, approximately?

A. Oh, about three years, I think.

Q. I see. Then the other three children were born after you came back to San Francisco from this Panama trip? A. Yes.

Q. You live now at 716 Spruce Street in South San Francisco, do you not, Mrs. Harrington?

A. Yes.

Q. How long have you lived there?

A. Within the last five years.

Q. And before that where did you live?

A. In South San Francisco on Railroad Avenue.

Q. Did you rent the property at Railroad Avenue? A. Yes. [40]

Q. And what about this Spruce Street house? Do you rent that or did you buy it?

A. We were buying it because we had difficulty

(Testimony of Joyce Antonia Harrington.)

—I mean because there were so many children that they didn't want us to live on Railroad, so we had to buy this house.

Q. I see. Now, at the time immediately prior to your husband's death what was his salary?

A. He made—well, with his overtime it was \$1,200, I think.

Q. \$1,200 per what? A. Per month.

Q. Per month? Did you have any financial problems?

A. No, except outside of the regular charge accounts and the house payment.

Q. That is, you had no bills other than charge accounts and the house payments? A. Yes.

Q. Well, do you mean by charge accounts just your current living costs or was there some excessive account or problem account?

A. No, we had charge accounts with the department stores and paid them within the month.

Q. You weren't behind on any of those, in other words? A. No.

The Court: How about the house payments? Were those [41] up? Were they current?

A. I don't understand.

Q. (By Mr. Decker): Were you paid up on your house payments? Did you owe any money—well, that isn't the way to put it, either. Were you behind on your payments on the house?

A. No, not at all.

The Court: That is what I meant by "current."

A. I see.

(Testimony of Joyce Antonia Harrington.)

The Court: They were paid up to date?

The Witness: Yes.

The Court: Were you in debt otherwise?

The Witness: No, sir.

The Court: Did you have any accumulations of savings or other property?

The Witness: No, sir. Not with five children.

The Court: In other words, to sum it up in one word, you were living within your income but you had no large outstanding debts?

The Witness: No, we were just catching up to the time before.

The Court: Well, were you caught up by that time?

The Witness: Yes.

Q. (By Mr. Decker): Did you own an automobile, Mrs. Harrington? [42]

A. Yes, we did.

Q. What kind of car was it?

A. It was a 1957 Studebaker.

Q. Was it paid for? A. All except \$300.

Q. How about the furniture in the house? Was that all paid for? A. Yes.

Q. You indicated that your husband had had some advanced training. What did you mean by that?

A. While he was in the service and he was stationed overseas he went to the different schools over there whenever he could, like the Pasteur Institute in Shanghai. He went to—I don't know all the schools he went to in Italy and Africa, but he did

(Testimony of Joyce Antonia Harrington.)

very far research on bacteriology and hematology.

Q. I see. Did he continue his educational activities in his field after you came back after your marriage? A. Only on his own.

Q. What do you mean by that?

A. He didn't go to school.

Q. I see.

A. He read at home and studied at home.

Q. I see. Did he appear to you to be interested in his job? A. Very interested, yes. [43]

Q. He appeared to you to like his job?

A. Yes. He would bring it home with him.

Q. What interests did he have other than his employment?

A. He was very fond of his gun collection, which he until then could only afford that year, and also in ham radio—amateur radio operation.

Q. Did he have some radio equipment there at 716 Spruce Street? A. Yes.

Q. Where was it located?

A. In the basement.

Q. Did you pursue this hobby with him?

A. Yes, I did.

Q. And he was a licensed amateur radio operator? A. Yes.

Q. Were you? A. Yes.

Q. I see. About what would you say was the amount of your investment in radio equipment?

A. I don't know exactly, but it was quite a bit.

Q. You indicated in your testimony that with

(Testimony of Joyce Antonia Harrington.)

respect to the gun collection he had added to it fairly recently? A. Yes.

Q. I believe you said something about him not being able to afford it before; is that what you said? [44] A. Yes.

Q. What did you mean by that?

A. Well, before he made this large salary we could not afford to buy guns and things for him, and he only pursued amateur radio.

Q. I see.

A. And he had, I think, one or two guns. But in 1960 when things were beginning to—I mean when we were not in a financial difficulty, he started—then he could afford to buy the guns he wanted.

Q. Did you work at any time during your marriage, Mrs. Harrington? A. Not at all.

Q. You never did? A. Never.

Q. How old is your youngest child, Mrs. Harrington? A. He is five.

Q. And your oldest, Arnold, is——

A. Twelve.

Q. Twelve now? A. Yes.

Mr. Decker: Your Honor, there is one thing I might have discussed in the opening statement, and that is we are going to have Exhibit A in this matter, being the gun involved, and I don't want to upset anybody. I have been [45] handling it and it's not loaded. I know that. I have it here and would like to show it to the witness and have her identify it, and later in the day there will be a gun expert here to testify about the gun.

(Testimony of Joyce Antonia Harrington.)

The Court: If there is no problem insofar as she is concerned. I don't think there is any dispute about it being the gun involved. I think Mr. Murray might stipulate to that.

Mr. Murray: I would, your Honor. So far as I know, that was the gun that was involved.

The Court: Well, subject to verification will you stipulate it is the gun involved in this case?

Mr. Murray: Certainly. I will be happy to.

The Court: Then that will save some of the questions about it, won't it, Mr. Decker?

Mr. Decker: Yes. I just want her to identify it.

The Court: Then it will be admitted into evidence as Plaintiff's Exhibit 1. That will be the gun and holster.

(Gun and holster referred to were received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Decker): Mrs. Harrington, referring now to Plaintiff's Exhibit 1 in evidence, which is the gun, about when did your husband acquire that gun?

A. That was his most recent—most recently acquired gun.

Q. About how long had he had it before this accident [46] took place—this incident took place?

A. I am not sure.

Q. Just a little while, then? A. Yes.

Q. Do you know whether he had had occasion to fire it? A. I don't know.

(Testimony of Joyce Antonia Harrington.)

Q. Do you know whether or not, from your observation, he was familiar with the gun?

A. He was thoroughly familiar with all his guns.

Q. Your husband belonged to a gun club of some kind, didn't he?

A. Yes. The South City—South San Francisco Rod and Gun Club and the National Rifle Association.

Q. Describe for us what his practice was with respect to firing his guns.

A. He would take very good care of them and each time that they had been fired he would take the whole gun apart and clean every movable part.

Q. How often did he fire the guns?

A. As far as I know, about once a week, or mostly twice a week. I would say.

Q. At the most twice a week? A. Yes.

Q. Where would he go to do this?

A. He went to the rifle range at Sharps Park. I have [47] never gone there with him so I don't know which one it is.

Q. By the way, Mrs. Harrington, how did you feel about these guns? What was your reaction to all this?

A. I don't like them. I have always had an adverse attitude towards them.

Q. Did you indicate this to your husband?

A. Yes. That is why I don't know if he had fired the gun or not before.

Q. Well, what do you mean?

(Testimony of Joyce Antonia Harrington.)

A. I don't know whether he had fired this particular gun or not because I don't care to know.

The Court: You mean out on the range?

The Witness: Yes.

The Court: You don't know whether he went out and practiced?

The Witness: No.

Q. (By Mr. Decker): In other words, unlike the radio hobby, you didn't take any interest in this particular activity of your husband's?

A. No.

Q. Was there some—was this kind of a sore point between you?

A. Yes, because I just didn't like them.

Q. Now, Mrs. Harrington, was your husband right handed or left handed? [48]

A. He had been left handed when he was a young boy, but I think he tried to change, and they say that his stutter was the result of that. I don't know.

Q. Did he stutter? A. Yes, he did.

Q. Was this a severe problem?

A. It had been better in the last few years before his death.

Q. I see. So far as you were able to observe, though, he favored his right hand, I take it?

A. Yes.

Mr. Decker: Does the Court want to take a recess or shall we go right ahead? It makes no difference to me.

(Testimony of Joyce Antonia Harrington.)

The Court: I think maybe we should take our recess now.

I just want to get this subject matter straightened out in my mind now. I don't know that it is of any great moment. You say that he was left handed or you understand that he was left handed as a youngster?

The Witness: His mother told me that he was left handed and so did he, but they corrected it.

The Court: Well, he or they?

The Witness: They did, meaning his mother and his teachers, I believe.

The Court: Well, was he ambidextrous or did he, after [49] the change, use his right hand as his major hand?

The Witness: He used his right hand as his major hand. I wouldn't say he was ambidextrous.

The Court: For instance, in throwing a baseball which hand did he throw it with?

The Witness: He didn't play baseball.

Q. (By Mr. Decker): What did he write with? Which hand did he write with?

A. With his right hand.

The Court: He wrote right handed?

The Witness: Yes.

The Court: Did he use a fork with his right hand when eating?

The Witness: Yes, sir.

The Court: And, well, handling a gun, which hand would he use? Which hand would he handle the gun with? I don't know whether you saw him

(Testimony of Joyce Antonia Harrington.)

handle very many. I mean, did he handle them right handed or left handed?

The Witness: I believe the right hand.

Q. (By Mr. Decker): Which hand did he use to operate the telegraph key when he communicated? A. His right hand.

Q. His right hand? A. Yes.

The Court: In other words, in all of these types of [50] activity where he would either use an instrument or engage in some activity which required the use of hands, he would use the right hand?

The Witness: When the work was precision.

The Court: Now, did I correctly understand you to say that he stuttered, but that the stuttering had improved during the later years?

The Witness: Yes, sir.

The Court: And when you say it had improved, do you mean that he spoke without any speech impediment?

The Witness: Yes, except when he met a stranger or he was—or the occasion was very formal, he had a tendency to stutter.

The Court: He still had under excitement and stress a speech impediment?

The Witness: Yes.

The Court: But this had changed considerably since the time you married him?

The Witness: Yes, it had improved very much, your Honor. Perhaps it wasn't as noticeable with others as it was with me.

The Court: What do you mean by that?

(Testimony of Joyce Antonia Harrington.)

The Witness: Because I know him so well—I knew him so well.

The Court: You mean a person who didn't know him [51] wouldn't observe his impediment as much as you who knew him very well?

The Witness: Yes.

The Court: This is not uncommon. This is usually true. Well, are you trying to tell me that as a general matter his speech impediment would only be noticed by you or by those who were really close to him, it was so slight?

The Witness: Yes.

The Court: Is that your point?

The Witness: Yes.

The Court: Then we will take the mid-afternoon recess and after recess we will go forward.

(Short recess.)

Q. (By Mr. Decker): Mrs. Harrington, I want to discuss with you the events of February 5, 1960. Did your husband work that day?

A. No, he did not.

Q. Why not?

A. Due to a slight reaction from his flu shot.

Q. Did you leave the home that day?

A. Yes, I went to see my—I went to Chinatown with a girl friend of mine.

Q. How did you go?

A. My husband took us both.

Q. Did your friend live in South San Francisco, too? [52]

(Testimony of Joyce Antonia Harrington.)

A. No, she lived in San Francisco and I was asked to call her if she would like to go with me, and we went together.

Q. I see. So your husband drove you to her house and picked her up—— A. Yes.

Q. ——and then drove you both down to Chinatown? A. Yes.

Q. About what time did you leave home?

A. I don't know. Approximately about ten to eleven, I believe.

Q. And who did you leave behind?

A. The children that didn't go to school.

Q. And which ones were those?

A. I think it was—oh, it was just Kim, the little one.

Q. Just the baby? A. Yes.

Q. And your husband then dropped you off in Chinatown about 10:30 or 11:00 o'clock in the morning, something of that kind? A. Yes.

Q. You had an arrangement with him as to how you were going to get back home?

A. Yes, I was to call him at 3:00 o'clock.

Q. Did you? A. No. [53]

Q. What did you do?

A. I went to a girl friend's house, and because I am a Roman Catholic and I had not been married in my church before to Harrington, I had always been seeking to be married in my church, and that day a student from USF was visiting. He was a student in theology and I was talking to him on the subject of—on the problem of my marriage.

(Testimony of Joyce Antonia Harrington.)

Q. I see. And where was this discussing taking place? A. At my girl friend's home.

Q. Is that the same girl friend who had accompanied you to Chinatown? A. Yes.

Q. So you and she had left Chinatown and returned to her residence that afternoon?

A. Yes.

Q. About what time was it when you did call your husband?

A. Approximately 6:00 o'clock.

Q. Around 6:00? A. Yes.

Q. Did he come to get you?

A. Yes, he did.

Q. Was he angry?

A. Yes, he was considerably irritable about my being late.

Q. Did you proceed directly home?

A. Yes. [54]

Q. When you got home you parked the car in the garage? A. No, we left it outside.

Q. And you and your husband went in the house together? A. Yes.

Q. Had you eaten? A. No, I had not.

Q. Had your husband and the children eaten?

A. Yes.

Q. Were all the children there when you got home with your husband around 6:00 o'clock?

A. Yes, they were.

Q. What happened then, Mrs. Harrington?

A. Well, he was scolding me about being late

(Testimony of Joyce Antonia Harrington.)

and as a defense I didn't talk. I just ignored him and wouldn't speak to him.

Q. Did you eat?

A. Yes, I did. I ate alone.

Q. And what was he doing during the time you were eating, and generally in that period of an hour or two after you got home?

A. I don't remember exactly, but I believe he was—oh, since I didn't speak to him, he began to pursue his hobby. He was cleaning—he was getting the guns out to clean.

Q. I see. The children were up at this time?

A. No, they went to bed except for Arnold. He was making [55] a research on his book report.

Q. He was doing his homework? A. Yes.

Q. Did your husband, if you recall, have anything to drink during that period while you were eating and while he was getting out his guns?

A. Yes. I know that he had because I saw the glass on the table and the bottle.

Q. In the living room? A. Yes.

Q. On the coffee table? A. Yes.

Q. Now, did your husband leave the home at any time that evening? A. Yes, he did.

Q. Now, I want you to tell me, if you can recall, do you recall seeing the bottle and knowing that he had something to drink before he left the home or after? A. I don't know.

Q. You are not sure about that? A. No.

Q. And what about your saying that he got out

(Testimony of Joyce Antonia Harrington.)

his guns? Do you recall whether he did that before he left the house or after he returned?

A. To the best of my memory, I think he did that before, [56] because I didn't talk to him and it was quite early in the evening.

Q. I see. About what time was it that he left the house? A. I don't know.

Q. How long was he gone?

A. About from half an hour to three-quarters of an hour.

Q. You don't know where he went?

A. No, but I assumed it was at the beach.

Q. Did he have a custom and practice of going out in the evening by himself?

A. No; only when he was perplexed or he was angry with me he would calm himself by going and sitting by the beach for a little time and then he would come back.

Q. You think that is what he did that night?

A. Yes.

Q. All right. About how long was it before this incident occurred that he returned to the house?

A. Would you rephrase that? I didn't understand.

Q. Some time after he returned to the house the incident took place that we are concerned with here, with the gun. A. Yes.

Q. I would like to have you tell us, to the best of your ability, about how long it was that this incident took place after he returned from going out?

A. Very shortly. [57]

(Testimony of Joyce Antonia Harrington.)

Q. It wasn't very long? A. No.

Q. Can you give us an estimate in terms of minutes or hours? A. I could not.

Q. Would you say that it was somewhere—well, was it more than an hour, do you think?

A. Oh, no.

Q. It was less than an hour? What did he do when he returned?

A. He asked me to make up with him, and I wouldn't do it.

Q. Where were you at that time?

A. I was sitting on the couch and I was putting up my hair.

Q. And was it at this time that all the children were in bed except Arnold? A. Yes.

Q. What did he do when—I take it he came into the living room where you were sitting?

A. Yes.

Q. And what did he do when you refused to speak to him?

A. Well, he was annoyed because I wouldn't make up with him, and I think he went and he started to clean his gun again, I suppose.

The Court: When you say you wouldn't make up with him, [58] do you mean you didn't talk to him?

The Witness: Yes, I refused to talk to him.

Q. (By Mr. Decker): Do you recall seeing him in the room after him coming in and asking you to make up and your not speaking to him?

A. I saw him, yes.

(Testimony of Joyce Antonia Harrington.)

Q. Where was he in the room after that?

A. He was sitting at his favorite place on the couch.

Q. In the living room? A. Yes.

Q. Same couch you were seated on?

A. Yes.

Q. Was he to your right or your left?

A. To my left.

Q. And you were putting up your hair, you say?

A. Yes.

Q. You were dressed for bed, were you?

A. Yes.

Q. What was he doing as he sat there on the couch to your left?

A. I think he was cleaning his gun.

Q. Was it this gun that is in evidence here?

A. Yes.

Q. What was he using to clean it with?

A. He usually used a chamois. [59]

Q. Do you have any recollection of seeing this chamois on this particular night?

A. Yes. It was on the coffee table.

Q. Do you have any recollection of him fixing a drink or a drink being fixed for him after he returned?

A. No, I don't.

Q. You do remember the glass and the bottle on the table?

A. Yes.

Q. Did he appear to you to be intoxicated when he returned from going out that evening?

A. No.

Q. What is the next thing that you can recall

(Testimony of Joyce Antonia Harrington.)

now that you observed or that caught your attention after you were aware of him sitting there to your left on the couch in the living room cleaning the gun?

A. Well, since I would not look at him and I wouldn't speak to him, I was watching the television program, and then my attention—I mean, the sound that attracted my attention was that I heard him clicking the gun, I think.

Q. That's the next thing you recall?

A. Yes.

Q. Now, Mrs. Harrington, was the sound that you heard this sound? (Demonstrating.)

A. No, it was louder.

Mr. Decker: May the record show that I was just [60] snapping the trigger, pulling the trigger with my index finger, with the gun on the safe position, and the hammer in the firing position?

Q. Was the sound that you heard this sound? (Demonstrating.) A. Yes.

Mr. Decker: And may the record show that that sound was made by my pulling the hammer to the cocked position with the safety mechanism on "Safe" and releasing the hammer by energizing the trigger, pulling the trigger?

Q. After hearing this sound—and, by the way, if you can remember, about how many times did you hear that sound while he was still sitting there?

A. I heard it several times, but I don't know exactly how many times.

(Testimony of Joyce Antonia Harrington.)

Q. All right, now, what is the next thing that you can recall that happened after that?

A. I asked him not to do it, and I told him it made me nervous to hear him do that.

Q. Was he still seated when you said this to him? A. No, he was standing.

Q. Do you recall seeing him get up?

A. No. I knew he was standing because he was in front of me.

Q. Where did he stand with relation to your position on the couch? [61]

A. Directly in front of me between the—the coffee table was between us.

Q. I see. So he was standing right across the coffee table from you? A. Yes.

Q. And he was in that position when you asked him not to make this noise? A. Yes.

Q. Had any of the noise that you heard and that you have just described, had any of those noises been made while he was standing in that position and before you said, "Don't do it"?

A. Yes, I think so.

Q. All right. Now, when you said, "Don't do it," as you have indicated, did you look up at him at that point?

A. Yes, I did and I saw the gun in his hand.

Q. Which hand was it in?

A. His right hand.

Q. And did you actually see him or were you watching him at a time when he made this noise with the gun?

(Testimony of Joyce Antonia Harrington.)

A. No, because I didn't speak to him, so I didn't want to look at him either.

Q. You did look up and saw him standing there with the gun in his right hand?

A. Yes. [62]

Q. But you looked away then, is that right? Is that the idea? A. Yes.

Q. All right, then, what is the next thing that happened?

A. He saw I was very annoyed, and I was afraid, you know, and he said—he tried to show me——

Mr. Murray: Forgive me, Mrs. Harrington. I think an objection is appropriate at this time.

The Court: Make your objection.

Mr. Murray: My objection is that the answer calls for hearsay testimony, hearsay statements on behalf of Mr. Harrington, statements which are inadmissible. I object on that ground.

Mr. Decker: Well, I haven't asked the witness to tell us anything Mr. Harrington said. I asked her what was the next thing that happened. However, I am aware of the fact that she might very well volunteer what he said.

The Court: Well, what you are objecting to, Mr. Murray, is that it will be hearsay as to any conversations?

Mr. Murray: Yes, your Honor.

The Court: Then I will just take the ruling on that objection under advisement and the testimony may be received subject to the objection, and I will

(Testimony of Joyce Antonia Harrington.)

just simply have to examine into the matter and rule on it, and any testimony that is given will be subject to a motion to strike on the [63] same grounds upon which the objection has been made. Your objection and the motion can run to all testimony, since the objection has been made, as to conversations by Mr. Harrington which were made prior to the time of his death.

Mr. Murray: Thank you, your Honor.

The Court: Now, there have been conversations answered by this witness without objection up to now. They are simply in the record as being in the record without objection. I don't know whether that **adds anything** or subtracts anything from your objection, but I call it to your attention so the record will be clear. In other words, she has testified to conversations and acts that occurred leading up to this particular moment.

Mr. Murray: Well, I take it, your Honor, that what we are coming to now is a statement by, alleged statement by Mr. Harrington which is crucial.

The Court: In part.

Mr. Murray: And it is this one that I have my objection to.

The Court: All right, your objection is noted for the record and I will reserve ruling. I will hear the testimony subject to the objection and the motion to strike in the event the objection is valid.

Mr. Murray: Thank you, your Honor.

The Court: Proceed, Mr. Decker. This goes only to [64] the conversations.

(Testimony of Joyce Antonia Harrington.)

Mr. Decker: Yes.

Mr. Murray: Yes.

Q. (By Mr. Decker): Now, Mrs. Harrington, I think the last question I directed to you was—strike that. Let's go back to this: You testified that you looked up and saw him standing with the gun in his right hand, and at or about that time you said something about, "Don't do that; it makes me nervous"; right? A. Yes.

Q. And then I think you said you looked away?

A. Yes.

Q. Now, what is the next thing—withdraw that. Did you look back up again?

A. No, I did not. But he did try to show me that it was perfectly safe, that the safety was on.

Q. Let me ask you this, then: After you had observed him standing there and then had looked away, did he say or do anything which caught your attention? A. (No response.)

Q. What is the next thing that happened? Let me put it that way. What did you hear or see?

A. Well, he was clicking the gun.

Q. He continued to click the gun?

A. Yes. [65]

Q. And that's the same click that we just described a moment ago?

A. Yes, because he knew it annoyed me.

Q. All right. And this was after you had asked him not to do it? A. Yes.

Q. Then did he stay in the same position while he continued to click the gun?

(Testimony of Joyce Antonia Harrington.)

A. Yes, he did.

Q. And about how many clicks do you remember hearing at this time?

A. Oh, I don't remember.

Q. You just remember the clicking?

A. Yes, I know he clicked the gun.

Q. All right. And then what is the next thing that happened?

A. When he clicked it again I asked him not to do it.

Q. Was this a second time? A. Yes.

Q. All right.

A. And he said, "Don't worry." He was annoyed because I didn't have confidence in him. He said, "Don't worry. The safety is on."

Q. What happened then?

A. Then he said, "I will prove it to you," and so he [66] pointed it towards his temple and he clicked it and that is when it went off.

Q. You were looking at him at that moment?

A. Yes.

Mr. Murray: May I interrupt for a moment?

The Court: Yes.

Mr. Murray: Your Honor, I have my prior objection, of course, and I also object to the conclusion as to the reason the witness says Mr. Harrington was annoyed. I think that is a conclusion, too, your Honor.

The Court: Well, I am sure it is a conclusion and you are entitled to object to opinions and conclusions, although the conclusion may be more

(Testimony of Joyce Antonia Harrington.)

formal than real. But since you have made the objection, why, I think that technically the objection is sound, and it may be practically a sound one, too.

If you want to cover it in a more direct manner, Mr. Decker, other than conclusions that he was annoyed——

Mr. Decker: Yes, I will do that, your Honor.

The Court: If you want to do that I will permit it. My own view of it is that this is one of these expressions by a witness which is a conclusionary statement of what actually occurred.

Mr. Decker: And, as such, admissible.

The Court: Yes. But it's a close question and it is [67] one that I have to interpret, and since I have to interpret it I would rather have the evidence in a more satisfactory manner.

Mr. Decker: May I suggest, your Honor, we come back to this? I have a witness here whom I would like to put on out of order.

The Court: Certainly.

Mr. Decker: You have no objection, Mr. Murray?

Mr. Murray: No.

Mr. Decker: Will you step down for a moment, Mrs. Harrington?

(Witness temporarily withdrawn.)

Mr. Murray: So that the record may be formally correct, may I make a motion to strike that part of the witness' testimony which is a conclusion?

The Court: Yes, and I will deny that motion on the basis that I think it is more semantical than real.

Mr. Murray: Thank you, your Honor.

Mr. Decker: Mr. Moore, will you take the stand, please?

RAY LESTER MOORE

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

The Clerk: Please state your full name to the Court.

The Witness: Ray Lester Moore. [68]

Direct Examination

By Mr. Decker:

Q. Mr. Moore, what is your occupation?

A. Gunsmith.

Q. You are a gunsmith? How long have you been a gunsmith?

A. About thirty-six years.

Q. That is, you have been making your living as a gunsmith for that length of time?

A. Right. Practically all that time, yes.

Q. Where are you employed now, sir?

A. Roos-Atkins.

Q. Roos-Atkins, in the Gun Shop?

A. In the Gun Department, yes.

Q. What kind of work does a gunsmith do, Mr. Moore?

A. Well, it pertains to a lot of different things. Making and repairing.

Q. Making and repairing firearms?

(Testimony of Ray Lester Moore.)

A. Refinishing.

Q. Are you familiar generally with all kinds of firearms that are in use? A. Most all types.

Q. And in particular are you familiar with this particular type of gun, and I am showing you now Plaintiff's Exhibit No. 1 in evidence? [69]

A. Yes, I have had considerable experience with them.

Q. Have you examined that particular gun at my request, Mr. Moore? A. Yes.

Q. I would like you, if you will, sir, to show us or to show his Honor how the safety mechanism works on that particular gun, and you can demonstrate it any way you think necessary.

A. There is a "On Safe" and a "Off Safe" position, as we all know. It is safe now. It will click and it will go. Now it is off safe. That is when you fire. Your gun shouldn't fire in that position.

The Court: This gun should not fire——

The Witness (Interposing): It should not, but there is a chance that—it might be among a million—that it would.

Q. (By Mr. Decker): Well, let's go into this in some detail, Mr. Moore. So far you have just demonstrated the safety mechanism itself and the two positions that it has, is that correct?

A. Yes.

Q. One is a position where the gun will not fire even though the trigger is pulled and the hammer falls? A. Right.

Q. And the other position is in the——

(Testimony of Ray Lester Moore.)

A. The firing position. [70]

Q. —the firing position. The gun is fully armed in that position and will fire upon being cocked and pulling the trigger, right?

A. Right.

Q. Now, will you show us what is the mechanical function or how the safety functions mechanically?

A. Well, inside——

Q. You can break down the gun, if you wish, Mr. Moore, and show us.

A. Inside the safety there is a cam that cams into the hammer. You would have to have a paper and everything else to take it apart.

Q. Well, go right ahead. Do you want some paper to protect the desk?

A. Yes.

The Court: Well, I think maybe you can give me the principle of the thing. When the safety is on and the hammer is released by the trigger, is there some object that intervenes between the hammer and the shell?

The Witness: Yes, on the safety itself between the hammer and the frame.

The Court: And the hammer then comes against the——

The Witness: The safety notch inside, yes.

The Court: And therefore will not explode the shell which may be in the barrel? [71]

A. That is true. It's not supposed to.

Q. (By Mr. Decker): It won't strike the firing pin?

(Testimony of Ray Lester Moore.)

A. The hammer is away from the pin in that position.

The Court: Even though the hammer is released by the trigger from the cocked position?

The Witness: That's right. It's still on safe.

Q. (By Mr. Decker): This is what is referred to as an "internal safety"?

A. That's right. See, that is on safe. The cam is in between the frame and the hammer.

The Court: So that the hammer will not hit the firing pin?

The Witness: No, it's not allowed to hit the firing pin.

The Court: And the firing pin, of course, hitting the firing pin is that which would cause the shell to explode?

The Witness: That causes the explosion.

The Court: All right, now, is there anything else you want to show about the mechanism of the gun?

Mr. Decker: Yes, your Honor. I have a series of questions I want to ask to bring out all the various possibilities here.

Q. Mr. Moore, let us assume that the gun is fired with just one bullet in the clip. What position will the gun be in after that single bullet is discharged? [72]

A. If there is no other ammunition in the gun, it will stay in that position. (Demonstrating.)

Q. And the record may show the position indicated is with the slide out, is that correct?

(Testimony of Ray Lester Moore.)

A. That's correct.

The Court: It is open and empty?

The Witness: Open and empty.

Q. (By Mr. Decker): And now, what would be the position the gun would be in if it were fired and there were remaining live rounds in the chamber?

A. If the gun were fired with live ammunition in the magazine, it would be in that position. It would be loaded.

The Court: And cocked?

The Witness: Ready to fire again.

Q. (By Mr. Decker): It automatically cocks itself, in other words? A. Yes.

Q. All right. How many rounds does this gun take? A. Ten.

The Court: That is the maximum?

The Witness: Maximum, yes.

Q. (By Mr. Decker): Now, Mr. Moore, how can the—you were present in court when I was demonstrating the various sounds that could be produced by the gun, were you not?

A. Yes. [73]

Q. And you heard Mrs. Harrington testify as to the sound that she heard, right?

A. I did, yes.

The Court: Well, will you stop there, Mr. Decker?

Mr. Decker: Yes.

The Court: When you made the noise by pulling

(Testimony of Ray Lester Moore.)

the trigger and having the hammer go down, did you have it in safety?

Mr. Decker: I did have it on the safe position.

The Court: And the other noise you made was with the hammer down in a safe position, is that correct?

Mr. Decker: Yes. I might illustrate that so we will be perfectly clear on it.

The Court: Now, the safety now is off? It is in the firing position?

Mr. Decker: That is right.

The Court: Now put the safety on.

Mr. Decker (Demonstrating): That is the clicking noise I made. I had the gun in the safe position and I released the hammer by pulling the trigger.

The Court: Yes. Now, how did you do it with the noise that Mrs. Harrington said she did not hear?

Mr. Decker: (Demonstrating.)

The Court: That is with the safety on and with the hammer down rather than in a cocked [74] position?

Mr. Decker: Yes.

Q. Now, referring to that louder noise, Mr. Moore, how can that noise be produced without discharging the gun, with the gun fully loaded?

A. With the safety on safe position. (Demonstrating.)

Q. The gun would not fire? What other ways could it be produced under those conditions?

(Testimony of Ray Lester Moore.)

A. By pulling the safety down.

The Court: He says without firing.

The Witness: That wouldn't fire.

The Court: What?

The Witness: It could be——

The Court: Halfway?

The Witness: Yes.

The Court: You mean you could do it in one motion?

The Witness: It could be done.

The Court: I see.

Q. (By Mr. Decker): That is, instead of pulling the trigger to release the hammer, you can push the safety lever from the firing position to the safe position and this will release the hammer, but the gun will not fire?

A. Will not fire, supposedly.

The Court: Without pulling the trigger?

The Witness: Without pulling the trigger, yes.

Q. (By Mr. Decker): And then, of course, a third way would [75] be to simply fan the gun to make that noise with the gun on safe?

A. It could be.

The Court: In other words, you wouldn't pull it clear back to the cocked position?

The Witness: (Demonstrating.)

Q. (By Mr. Decker): Will you do that just once more? A. (Demonstrating.)

Q. All right, now, in either case, that is, any of those three conditions that we just described, with the gun on safe, releasing the hammer with the

(Testimony of Ray Lester Moore.)

trigger, or with the gun on the firing position and releasing the hammer by moving to the safe position, or by just fanning or pulling the hammer back partially and releasing it, with respect to any of those conditions, a snapping noise occurring as a result of any of those three, it is true, is it not, that another similar noise would not be made without cocking the gun? A. Not very well.

Q. Do you see what I am getting at? Let's assume that the gun has been clicked in any one of those three manners, a clicking noise has been produced. How, then, in order to make another clicking noise, it would be necessary to pull the hammer back, would it not? A. It would.

Q. There is no other way to do it? [76]

A. I don't think so.

The Court: Could you evict the shell and cock the gun and put a new shell in the barrel?

The Witness: You can do that by pulling the breach back——

The Court: Yes, you can pull the breech back.

The Witness: Provided the magazine was loaded.

The Court: Yes. And pump a shell out of the chamber and put one back in and the gun would be in a cocked position?

The Witness: That would leave it in a cocked position.

The Court: And ready to fire? The safety would be off?

The Witness: Yes, ready to fire.

(Testimony of Ray Lester Moore.)

Q. (By Mr. Decker): Could this be done without discharging one round?

The Court: When you say "discharging," you mean "ejecting"?

Mr. Decker: No, I mean discharging.

The Court: You mean firing?

Q. (By Mr. Decker): Will it automatically cock itself, Mr. Moore, without actually discharging one of its bullets?

The Court: Well, either say "firing" or "ejecting." I don't think "discharging" is the word you use.

Mr. Decker: All right. O.K. [77]

The Court: That is as I understand it. Isn't that correct? You either fire or eject, don't you?

The Witness: Well, by taking them out by hand, that's the way you would do it.

The Court: Yes. You can eject it by hand.

The Witness: You can eject it by hand, yes.

Q. (By Mr. Decker): And in the event you do that, will it arm itself automatically? Will the hammer be back in firing position? A. Yes.

The Court: That is a rather clumsy way to do it, though, isn't it?

The Witness: It sure is.

Q. (By Mr. Decker): You might demonstrate—well, we don't have any live rounds or any dummy rounds.

The Court: No, and I don't want any.

Mr. Decker: We don't need to demonstrate that. All right.

(Testimony of Ray Lester Moore.)

The Court: The answer to that one is "No."

Q. (By Mr. Decker): Now, if we make any of those clicking noises in the manner described, and with the safety mechanism in the safety position, we won't disturb that lever in any way, will we? The safety lever will stay on "Safe"?

A. It's on "Safe," yes.

Q. Let's assume it is on "Safe" to start with and then we [78] produce that clicking noise by pulling the trigger, at the conclusion of that operation the gun will still be on "Safe," won't it?

A. It will.

Q. And if we produce that clicking noise by releasing the hammer with our thumb, it will remain in the safe position?

A. It will.

Q. And if we produce that clicking noise by moving the safe lever from "Fire" to "Safe," this gun will still remain in the safe position; correct?

A. Right.

Q. So any of those three ways that we cause this clicking noise with the safe on will not disturb the safe, but it will remain in the "On" position, correct?

A. That's right.

Q. In other words, it is true, isn't it, Mr. Moore, that in order to put that gun in a position where, operated normally, it will fire, we have to move that safety lever from the safe position back to the firing position, is that right?

A. That's right, yes.

Q. All right. Now, I want you to assume, Mr. Moore, that the person who was handling this gun

(Testimony of Ray Lester Moore.)

was producing the clicking sound that we have been talking about, the loud noise of the hammer falling all the way to within a very short distance of the firing pin. And assume that this person, having done that [79] a few times, caused the gun to discharge, to fire. Could that have been done in any way other than by moving the safe mechanism from "Safe" to "Fire"? A. Not very well.

Q. Well, is there a possibility, no matter how remote, that the gun would fire with the safety lever in the safe position?

A. Well, they seem to at times.

Q. That is, no gun is perfect; is that what you are saying?

A. That's right. Not as long as there is ammunition.

Q. What could cause this to happen?

A. We don't know. It has been a major puzzle with all gunsmiths.

Q. Is that any more true of this particular gun than any gun? A. Not necessarily, no.

Q. What you are saying is that if the gun functions as it is designed to, functions normally, it will not fire under these conditions?

A. Well, it shouldn't fire, no, but there is a possibility.

Q. Well, what is that possibility, speaking now out of your experience with guns?

A. Well, there would be no way of knowing, but it would [80] be probably a million to one chance

(Testimony of Ray Lester Moore.)

that they would ever go off, but they have been known to do it.

Q. All right. So what you are doing now is simply indicating that there is no such thing as a safe gun; isn't that substantially what you are saying? A. Well, yes, in a way.

Q. All right. Well, then, let's assume that this is not what happened, that this one-in-a-million thing isn't what happened. What would be required to get that safety lever off of the safe position to the firing position?

A. Well, it would be pressure, but I don't understand just what you mean.

Q. Could it have been done inadvertently?

A. That's one way of doing it, and that is why a lot of them happen, they do cock them with both hands to make a mistake, pulling mistake, yes.

Q. That is, a person using both hands might inadvertently pull the safety back at the same time he pulled the hammer back?

A. That is true. That has happened.

Q. What about the safety mechanism itself? Is it on safe when it is in that locked position there?

A. Yes.

Q. All right, now, you have moved it about a quarter of an inch back. Would the gun fire with the safety in that [81] position? A. No.

Q. Is there a point where the gun will fire before it reaches all the way back to the firing position?

A. No, it has got to get clear—well, it might be

(Testimony of Ray Lester Moore.)

to a thousandths of an inch or something like that.

The Court: The safety works until the safety pin is clear open?

The Witness: Until the cam is moved completely out of the way, yes. Where the cam is worn, then it could. It would still fire in that position. It goes up here where it is rigid.

Q. (By Mr. Decker): I see. So, for the record, you have been able to move the safety mechanism from the firing position forward a little bit and the gun still fires? A. It would still fire.

Mr. Murray: I don't think there is any basis in the record for that.

Mr. Decker: Well, that is what he just testified to.

The Court: Well, this is his opinion now. Whether it will or won't is a matter for him—I mean an expert——

Mr. Murray: Well, I just didn't think the witness had said that.

The Witness: Well, it will fire as long as this hammer will strike the pin. [82]

The Court: Yes, but it couldn't strike the pin on this weapon if the——

The Witness (Interposing): Even in that position, with repeated clicking it might jar that off. It can't go if you cock it clear back. Now, this (demonstrating) I don't know. Sometimes they get worn, and will.

Q. (By Mr. Decker): What about in cocking the gun with just the right hand? Is it conceivable

(Testimony of Ray Lester Moore.)

that in pulling back the hammer with the right thumb the safety mechanism could be pulled back at the same time?

A. Well, it's a very high safety and it could if it slipped. I wouldn't know. It would be very hard to say. It could be done, yes, by slipping.

Q. Did you find anything wrong with the safety mechanism on this gun? A. No.

Q. You did tear it down, didn't you?

A. I did, yes.

Q. And you found nothing mechanically wrong with the gun? A. No.

Mr. Decker: I think that is all, Mr. Moore.

The Court: Then you may cross-examine, sir.

Mr. Murray: Thank you, your Honor.

The Court: If you want me to observe any motions, why, I will step over and do it and observe it if that becomes [83] necessary.

Mr. Murray: I have no questions of Mr. Moore, your Honor.

The Court: All right, Mr. Moore. That is all.

(Witness excused.)

Mr. Decker: Shall we take our recess now, your Honor?

The Court: It all depends on how far you can get. Can we conclude the direct examination of Mrs. Harrington, or at least get to the point where you could say you were practically through and just want a chance to review your notes?

Mr. Decker: I am practically there. However,

I do want her to draw a diagram for us, which she did in the deposition, to show the location of herself and her husband in the living room. I think it is probably a matter of about twenty minutes.

The Court: Why don't you do this: Have her appear here before court proceedings and put it on the board? That is, the location of the furniture and the room itself and explain it to counsel in advance so we can have as much advance notice as possible. Then if you want to put in the position of the things, she can do that on examination, by getting the basic design done and ready to go.

(Discussion between Court and counsel off the record.)

The Court: Do you think we can conclude this tomorrow? [84]

Mr. Decker: I think so, your Honor.

The Court: Are you going to have very many witnesses?

Mr. Murray: No, our case will be relatively brief.

The Court: Can you indicate about how many witnesses you expect to have?

Mr. Decker: Yes; I am going to call two officers who investigated the scene, but they will be quite short witnesses. Then I may call a doctor to testify to the alcohol blood count, which again will be quite short.

The Court: Can't that be stipulated to?

Mr. Decker: It probably can be.

Mr. Murray: Insofar as I am concerned, it can be.

Mr. Decker: Here is the problem: We have an agreement we are going to submit on the issue of cause of death, a stipulation, and that stipulation is taken from a transcript containing the report of the inquest and it includes a statement about the blood alcohol content found at the inquest—not the inquest, but the autopsy. I want to include in that stipulation such evidence as to what the significance of this finding is in terms of degree of sobriety or lack thereof.

The Court: Well, you may want to do that if you can't agree on it. Aren't there tables of standards that will show that?

Mr. Decker: That is right. I intend to pursue that with counsel. [85]

The Court: All right, try to do that. I don't know what the use of alcohol has to do with this case, if anything. But I can't prejudge that because I don't know.

All right, we will be at recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to tomorrow, Tuesday, March 21, 1961, at 10:00 o'clock a.m.) [86]

Tuesday, March 21, 1961—10:00 A.M.

The Clerk: Joyce A. Harrington versus New York Life Insurance Co., further court trial.

The Court: The record will show that the plain-

tiff is on the witness stand. She has heretofore been sworn and is testifying on direct examination.

Mr. Decker, are you ready to proceed with the direct examination?

Mr. Decker: Yes, your Honor.

The Court: All right, will you proceed.

JOYCE A. HARRINGTON

resumed the stand.

Direct Examination

(Continued)

By Mr. Decker:

Q. Mrs. Harrington, prior to starting out the court session you have placed upon the blackboard in the courtroom a diagram, have you not?

A. Yes.

Q. Briefly, with respect to this diagram, I gather that this is a floor plan of the main living area of your home at 716 Spruce Street, South San Francisco, is that right?

A. That is right.

Q. And you have indicated here in the lower left-handed corner an irregular shape. I gather that is the couch you [87] were referring to yesterday in your testimony?

A. Yes.

Q. And this round object in front of the couch is the coffee table that you were referring to?

A. That is right.

Q. I take it, then, that there was an open archway between the living room and the dining room; is that right?

A. Yes.

Q. And in your testimony yesterday you re-

(Testimony of Joyce Antonia Harrington.)

ferred to a television set, and that would be this object here, marked "TV," correct?

A. Yes.

Q. And what is this square object here alongside the television set?

A. That is the chair that Arnold sat on.

The Court: Do you mean the boy, Arnold?

The Witness: My son.

Q. (By Mr. Decker): That is where Arnold was seated at the time this incident took place?

The Court: Both the deceased and this boy are named Arnold?

The Witness: Yes.

The Court: He is Arnold, Jr.—or is it Junior?

The Witness: It is Junior, but I usually called my husband Harry. [88]

The Court: I know you have a distinction in your mind, but the pleadings here show they are both named Arnold.

Mr. Decker: I will refer to him as Arnold, Jr.

The Court: All right, so I can keep the distinction in my mind.

Q. (By Mr. Decker): So this point which is unmarked alongside the television set is the chair in which Arnold, Jr., was seated at the time the incident occurred? A. That is right.

Q. And he was facing, if I am correct, in the direction which this arrow indicates on the chair?

A. Yes, that is right.

Q. Then there are three "X's" marked on the diagram. I take it that the "X" I am now indicat-

(Testimony of Joyce Antonia Harrington.)

ing as "X-1" is the place where Mr. Harrington was seated at the time he was cleaning the gun with the chamois cloth, as you testified? A. Yes.

Q. And the point which I am now marking as "X-2" is the place where you were sitting at the time the incident occurred?

A. That is right.

Q. And the other "X," which I am now marking as "X-3," I take it, is the point where Mr. Harrington was standing at the time he asked you—well, immediately before the incident occurred?

A. Yes. [89]

Q. And following the incident he fell at Point X-3 on the diagram? A. That's right.

Q. At any time that evening up to the time the incident occurred, Mrs. Harrington, according to your observation, was Mr. Harrington intoxicated?

A. No.

The Court: You say "at any time"?

Mr. Decker: At any time.

Q. I think, as we concluded your testimony yesterday, Mrs. Harrington, you had indicated that following your second request to Mr. Harrington to not click the gun any more, you had looked away? A. Yes.

Q. And then you heard him say something to the effect that—and this is the testimony that was objected to and has not been ruled upon yet, and I take it there is an objection to it?

Mr. Murray: Yes, the same objection.

(Testimony of Joyce Antonia Harrington.)

Mr. Decker: I was just trying to pick up the threads.

Mr. Murray: And I take it our objection is still good?

The Court: Yes, the ruling will run to the testimony, so you may proceed.

Mr. Decker: All right, sir.

Q. You heard him say, after looking away, something to the effect that "there is nothing to be nervous about. The gun is [90] on safe. Look, I will show you." That is substantially what you testified to?

A. Yes, it is.

Q. Did you then look as he requested?

A. Yes, I did look.

Q. And what did you see?

A. I saw that the gun was pointed towards his temple.

Q. And what happened then?

A. And it went off.

Q. You were looking at him when this happened?

A. Yes.

Q. The gun was in his right hand?

A. Yes.

Q. What was the appearance on his face when the gun went off?

Mr. Murray: Your Honor, I think this question is going to call for hearsay testimony and a conclusion of the witness, in addition, and I must object on those grounds.

The Court: Well, this is one of those really shadowy areas.

(Testimony of Joyce Antonia Harrington.)

Mr. Decker: Your Honor, in the case of *Holland v. Zollner*, 102 Cal. 633, 36 Pacific Reporter 930, the following question was held to be proper: "What was the appearance of this man at that time with reference to his being rational or [91] irrational?"

The Court: As I say, this is a somewhat shadowy area. It is my view that the question could be answered by conclusions or could be answered factually. In other words——

Mr. Murray: Well, I am content to await your Honor's ruling until after the question is answered, with the understanding, of course, that my objection runs.

The Court: I am inclined to let her answer it in her own words, and I would say to you, Mrs. Harrington, as nearly as you can, would you tell us what he looked like in terms of facial expression rather than in your conclusion as to what frame of mind the expression conveyed to you, if this is possible? This is a very difficult thing in both semantics and expression. Of course, I know you have a foreign language background. You speak English rather well, but you still have to search for a word from time to time, I imagine, in expressing your thoughts in English, so I don't expect you to do this to perfection, but do it to the best of your ability.

Now, do you understand the distinction I am trying to make?

The Witness: Yes, sir.

(Testimony of Joyce Antonia Harrington.)

The Court: All right. Would you answer the question, please?

A. I remember very markedly that he looked at me with great surprise upon his face, and he threw up his hands as he fell. [92]

Mr. Murray: Your Honor, I think this is exactly the problem I had in mind. I believe this is clearly a conclusion. Mr. Harrington was obviously in a state of great shock. A bullet had just passed through his brain. I don't believe that the witness is in any position to evaluate——

The Court (Interposing): She saw it while it occurred. She could see change of expression. The real problem here is for her to describe what she did see.

Mr. Decker: There is plenty of authority on this, your Honor.

The Court: I am inclined to think——

Mr. Decker (Continuing): She can describe what she saw in terms which, it is true, can be called a conclusion; but, on the other hand, it is the best way a lay person can indicate what the fact was, instead of saying that his eyebrows were raised or his pupils were dilated or something of that kind.

The Court: I will make the record clear and I will give you a clear-cut ruling. I will overrule the objection and let the answer stand.

Q. (By Mr. Decker): Now, at the time this happened Arnold, Jr., was sitting there in his chair, wasn't he? A. Yes.

Q. And all the other children were in bed?

(Testimony of Joyce Antonia Harrington.)

A. They were.

Q. What did you do when this happened? [93]

The Court: Now, is this of any moment in this case, what happened afterwards?

Mr. Decker: I submit that it is, your Honor. I think that in order for you to make a finding of fact as to what this man's state of mind was at the time this occurred, and according to my theory of the case, this is the essential issue, according to the way I read the authorities, this is an accident within the meaning of the policy if Mr. Harrington at the time he performed this act did not anticipate or foresee or intend that injury would result from the act itself. Now, in order to make that determination, because we have no direct evidence of what his state of mind was, we have to refer to the circumstances.

The Court: Yes, but now this act has been completed. He can now have no intention whatsoever, and the only purpose for which this testimony could be used by any stretch of the imagination is that, would his prior intention have been foreseen in view of the circumstances that occurred afterwards?

Mr. Decker: That's right. For instance, it seems to me that your Honor might draw an inference that Mr. Harrington took his own life, as opposed to this being an accident, depending upon the reaction of Mrs. Harrington to this incident, and the reaction of other people who came to the scene immediately thereafter.

I grant you, sir, that this is what we might call,

(Testimony of Joyce Antonia Harrington.)

in an [94] ordinary case, remote; but it seems that all of the circumstances that occurred that evening, both before and following the incident, are relevant to this issue of the state of mind of the deceased at the time he performed the act. And this, of course, is the theory upon which I proceed.

The Court: Well, all I will say to you is that I will permit the testimony, but I am going to ask for ultimate facts—that is, mainly where certain things were, where people were, where they went, and what they did within a limited period of time.

Mr. Decker: That is precisely what I plan to do, your Honor.

The Court: All right. I don't want conversations. It seems to me that conversations by third persons will violate the hearsay rule.

Mr. Decker: We will cross that bridge when we get to it, your Honor.

The Court: All right.

Q. (By Mr. Decker): Now, Mrs. Harrington, then, very briefly, and in order to expedite this, is it true that thereafter you called the police?

A. I gathered the children into the room first, because they were coming out when they heard the noise, and then I called the police.

The Court: When you say "the children," you mean all of [95] the children?

The Witness: Yes. They heard the noise.

The Court: Yes. I am talking about Arnold, Jr. Did you send him away, too?

The Witness: Yes.

(Testimony of Joyce Antonia Harrington.)

The Court: You sent him into the bedroom?

The Witness: Yes.

Q. (By Mr. Decker): And about how long was it before anybody arrived at the scene?

A. I don't know.

Q. Well, I would appreciate it if you could give us some estimate. Was it more than an hour?

A. No.

Q. Was it more than half an hour?

A. No. After I called the police, I think they arrived in ten minutes or so.

The Court: This is the South San Francisco police?

The Witness: Yes, your Honor.

Q. (By Mr. Decker): You think it was about ten minutes or so that you waited there for the police to arrive? A. Yes.

Q. All right. During this time the children were in the bedroom? A. Yes.

Q. Where were you when the police came? [96]

A. I think I was in the door or—I don't quite remember.

Q. You mean the front door? A. Yes.

Q. All right. And did one or more than one officer come initially?

A. I remember seeing only one.

Q. I take it he pulled up in a car in front of your house and came to the door?

A. I just saw him running.

Q. He did come into the house? A. Yes.

Q. All right. And did you see the gun, which is

(Testimony of Joyce Antonia Harrington.)

Plaintiff's Exhibit 1 in evidence, at any time following the incident which you have related?

A. I did not.

Q. Did you yourself or anybody else in your presence handle the gun? A. No.

Q. Did an ambulance come?

A. Yes, it did.

Q. And this was what? Shortly after the police arrived?

A. There I have no recollection of time.

Q. All right. What was done with the children that evening?

A. I also called my neighbor to help me and I believe that [97] she had taken them to her house.

The Court: You mean your children?

The Witness: Yes.

Q. (By Mr. Decker): You went to the hospital, Kaiser Hospital in South San Francisco, is that right? A. That's right.

Q. Now, Mrs. Harrington, after this incident occurred did you have a conversation with a representative of the insurance company, Mr. Burgess, of South San Francisco?

A. On the same night?

Q. No, just afterwards.

A. Yes, I did. He came to see me, yes.

Mr. Decker: Could I see those documents we were looking at earlier, counsel, please? Thank you very much.

Q. I want to show you this photostatic copy of a document entitled, "Proofs of Death, Claimant's

(Testimony of Joyce Antonia Harrington.)

Statement," submitted to the New York Life Insurance Co., consisting of three pages, and purportedly showing your signature on Page 1, and ask you if that is your signature.

A. That is my signature.

Q. Do you recall signing that document?

A. Yes, I do.

Q. And was that document filled out, that is, the typewritten portion, completed by you?

A. You mean did I type it? [98]

Q. Yes. A. No, I did not.

Q. Do you know who did? A. No, I don't.

Q. What were the circumstances under which you signed this document, very briefly?

A. I was just told that he was going to help me.

Q. Did Mr. Burgess come to your house?

A. Yes, and it was amid very many confusions, because there were very many people there, and I was very grateful that he was going to help me.

Q. So you signed this document? A. Yes.

Q. What else did you do at that time, if you recall? What about the contracts of insurance?

A. Oh, I gave them all to him.

Mr. Decker: I would like to offer this as Plaintiff's next in order, if the Court please. And I would like to call the Court's attention to the "Received" stamp on the document which reads as follows: "Received C.S.O.—San Francisco, February 16, 1960, New York Life Insurance Co."

The Court: Do you have any objection to its admissibility?

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: Your Honor, I have no objection to the admissibility of the paper insofar as it goes to show submission [99] of her proof of claim. I do, of course, object to her statement as to the cause of death upon the proof of claim, but I take it that the document is not admissible for that purpose.

The Court: You mean the statement itself?

Mr. Murray: Yes. It is shown as "accidental shooting," your Honor.

The Court: Well, that is her claim and that is all it is.

Mr. Murray: Yes. I take it that the piece of paper is not admissible as proof of the fact that death was by accidental shooting, and we would object to it on that ground.

The Court: Are you offering it for that purpose?

Mr. Decker: No, your Honor.

The Court: I don't think it's admissible for that purpose.

Mr. Murray: I just wanted the record clear on that point, your Honor.

The Court: It is admissible that she claimed it was an accidental shooting, if that has anything to do with this case. It will be admitted into evidence as Plaintiff's Exhibit 2.

(Claimant's Statement was received in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: It is a photostatic copy and you have no objection to its form, I take it? [100]

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: No, your Honor.

Mr. Decker: While we are getting this documentary evidence in, counsel and I have agreed that as to the contracts of insurance themselves, your Honor, the original of one of them which has been in the possession of counsel for defendant, and a conformed copy of the other original, may be submitted to the Court.

The Court: And admitted into evidence?

Mr. Decker: As evidence of the contracts themselves.

The Court: Is this satisfactory with you, Mr. Murray?

Mr. Murray: Yes, your Honor. We have only the original of one of the contracts.

The Court: Well, the conformed copy is satisfactory to both parties?

Mr. Murray: Yes, your Honor.

The Court: Then do you want them admitted as one exhibit or as two exhibits?

Mr. Decker: I think one would be preferable.

The Court: Does it have the same clause insofar as accidental death is concerned?

Mr. Decker: The crucial language is the same. They vary a little bit in other details.

The Court: Well, are the other details going to be involved in this matter?

Mr. Murray: I think not, your Honor. [101]

The Court: Then they will be admitted into evidence, both policies, as Plaintiff's Exhibit 3.

(Testimony of Joyce Antonia Harrington.)

(Policies were received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Decker): Mrs. Harrington, following the turning over of the contracts of insurance to Mr. Burgess and also the signing of the proofs of death form, which is Plaintiff's Exhibit 2 in evidence, did you receive a letter from the New York Life Insurance Co.? A. I did not.

Q. Did you correspond with the company? Did you write or was there any contact between you and the New York Life Insurance Co. following that?

A. Only through Mr. Burgess, and after I asked him for the rest of the insurance he told me that I was not entitled to it, and he said he would try to get it for me, and I waited for about a month or so and I wrote to them.

The Court: You wrote to the insurance company?

The Witness: To the insurance company. And they replied, saying that I was not entitled to it.

The Court: You mean they said you were not entitled to the——

The Witness (Interposing): The double indemnity portion.

The Court: ——the double indemnity. [102]

Q. (By Mr. Decker): You did receive the face value of the policy, \$15,000 and some odd, didn't you? A. Yes.

Q. And you told me you have, you think, that

(Testimony of Joyce Antonia Harrington.)

letter at home? You will try to produce it for the Court?

The Court: Oh, well, there is no necessity for that, is there? The company denies that it is liable and isn't that enough?

Mr. Decker: Well, I am thinking—well, it may well be, your Honor. I am thinking of the subsidiary problem of the interest. There is a provision in the Insurance Code, if the Court please——

The Court: Oh, this is another matter. I wasn't thinking of the insurance question. If you think this is material on that point, why——

Mr. Decker: I think it may well be.

The Court: Is there going to be any argument as to the written record, Mr. Murray? This letter was a letter sent to her denying liability on the double indemnity portion of the policy?

Mr. Murray: I believe there was, your Honor. I am not certain now. I can check and find out.

The Court: Can't we get the exact dates if this becomes a material point——

Mr. Murray: Of course. [103]

The Court: ——and stipulate to it?

Mr. Decker: Yes.

Mr. Murray: Fine, your Honor.

The Court: Because, as I take it, there is no question so far as the company is concerned but what it has always denied liability for double indemnity.

Mr. Murray: I think that is true.

The Court: I don't know when this letter would

(Testimony of Joyce Antonia Harrington.)

have been written, but at the time it was written—would you try to find out when that is?

Mr. Murray: Yes, your Honor.

The Court: What was that agent's name, again?

The Witness: Burgess. L. Burgess.

Mr. Decker: B-u-r-g-e-s-s I think is the right spelling, your Honor.

The Court: Now I want to be sure about this: At first he told you that you could not recover for the double indemnity? He told you that and then you wrote to the company?

The Witness: Yes, sir.

Q. (By Mr. Decker): And you received a reply from the company confirming this so far as they were concerned? A. Yes, that is right.

Q. Now, Mrs. Harrington, I may have asked you some of these questions at the outset of the direct examination yesterday, and if I did, and if the Court so recalls, I will withdraw [104] these questions. I can't remember at this point exactly what I did ask you.

But let me ask you now: So far as you were able to observe, and now I am only asking for your observation of Mr. Harrington, was he addicted to the use of alcohol or drugs? A. No.

Q. Had he ever threatened to take his own life?

A. No, never.

Q. Had he ever, so far as you know, attempted to take his life in the past? A. No.

Q. Had he ever inflicted violence upon you?

A. No.

(Testimony of Joyce Antonia Harrington.)

Q. Did he leave any kind of a, what is commonly called a suicide note? A. No.

Q. How would you characterize your marriage to Mr. Harrington?

A. We loved each other very deeply and we were happy.

Q. Do you know of any reason why your husband might have wanted to take his own life?

A. No, I do not.

Mr. Decker: I think that is all.

Now, your Honor, it is getting along in the morning and I anticipate that Mrs. Harrington's cross-examination will be [105] quite lengthy. I have two officers from the South San Francisco Police Department here whom I would like to put on out of order.

The Court: Is there any objection?

Mr. Murray: Your Honor, I have no objection at all to calling the officers out of order. I don't think Mrs. Harrington's cross-examination will be "quite lengthy," but, on the other hand, the officers are here.

The Court: Well, we will attempt to accommodate the officers. Mrs. Harrington, would you step down, then, temporarily, and we will hear the officers, and your cross-examination may follow?

Mr. Decker: Officer Swinfard, would you step forward, please?

JAMES F. SWINFARD

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name for the Court.

The Witness: James Franklin Swinfard.

The Clerk: How do you spell your last name?

The Witness: S-w-i-n-f-a-r-d.

Direct Examination

By Mr. Decker:

Q. Mr. Swinfard, you are a police officer employed by the Police Department of South San Francisco, are you? [106] A. Right. Yes, sir.

Q. And you were on duty, were you, on February 5, 1960? A. Yes, sir.

Q. Did you receive a call—or let me put it this way: How did the incident which Mrs. Harrington has been testifying about here come to your attention?

A. I was dispatched by our office via radio.

Q. That is, you were alone, were you, in your radio car that evening?

A. At the exact time I was directing traffic for a fire, standing near the car, and I heard the radio and proceeded alone.

Q. All right. Where was the location of the fire? Where were you?

A. I was at the corner of Grand Avenue and Maple in South San Francisco.

Q. How long did it take you to get to the Harrington home?

(Testimony of James F. Swinfard.)

A. A maximum of five minutes.

Q. You were unaccompanied? You were by yourself at that time? A. I was.

Q. Mr. Swinfard, where did you bring your patrol car to a stop?

A. I believe it was in front of the house next door to Mrs. Harrington's home. [107]

Q. I see. Did you have a record of exactly what time you received that call and your time of arrival at the house?

A. If I may refresh my recollection, sir?

Q. You may.

The Court: You may.

A. At 10:32 p.m. I was dispatched to the scene, sir, on the 5th of February.

Q. (By Mr. Decker): And it is your best estimate it was five minutes, give or take a minute or so, when you arrived at the Spruce Street address?

A. Yes, that is correct.

Q. Now, when you arrived there did you see Mrs. Harrington right away? A. Yes, sir.

Q. Where was she?

A. She was outside her home.

Q. How was she dressed?

A. I believe she had on a robe, a dressing robe.

Q. All right. Then what did you do? Just describe what you did when you got out of your car.

A. I got out of the car and asked her what had happened.

Q. And this happened as soon as you got out of your automobile which was parked there in front

(Testimony of James F. Swinfard.)

of the neighbor's house? A. Yes, sir.

Q. What did she say? [108]

Mr. Murray: Your Honor, I am afraid I will have to object to that question. I think it calls for clear hearsay on the part of Mrs. Harrington.

Mr. Decker: Now, your Honor, I ask this question recognizing that there is a hearsay problem, but upon the basis that anything that Mrs. Harrington had to say to Officer Swinfard within a matter of a very few minutes after this incident occurred is a statement made under conditions of stress and excitement and, obviously, I think, falls within the spontaneous declaration exception to the hearsay rule.

The Court: This is one of the matters that are mentioned in the—I think it is 1870 of the Code of Civil Procedure, and is sometimes called part of the *res gestae* rule.

Mr. Decker: Yes.

Mr. Murray: Yes, your Honor. May I be heard on that?

The Court: Yes.

Mr. Murray: I think the theory of the *res gestae*, and I expect Mr. Decker would agree, or the spontaneous declaration rule, is that the witness under the immediate impetus of whatever has happened speaks, the accident speaks, so to speak.

The Court: Yes.

Mr. Murray: Now, the courts have uniformly held, I believe, that when an appreciable period of time has elapsed, [109] enough so that the witness

(Testimony of James F. Swinfard.)

is speaking consciously himself with consideration of what has happened, or the possibility of that, that it does not fall within the *res gestae*.

Now, in this particular situation we don't know how much time has passed since Mr. Harrington had fired the shot, but we do know that it was at least ten minutes. Mrs. Harrington has testified that it took the police about ten minutes to get there. She has also testified that she didn't call the police right away. She put the children into the bedroom. We don't know how long that took.

Now, she had time to put the children in the room, call the police, time for the police dispatcher to call Officer Swinfard, and time for Officer Swinfard to get into his car and arrive at the scene. I don't believe this comes within the *res gestae* rule, your Honor.

Mr. Decker: She testified they arrived within approximately ten minutes from the time she called them.

Mr. Murray: From the time she called them.

The Court: Well, there isn't much quarrel about the facts here, Mr. Decker. What Mr. Murray has stated is very consistent with what you have stated and with what the witness testified, so the question is not what occurred, but is what occurred within the so-called spontaneous declaration rule or the *res gestae* rule under the circumstances.

It seems to me this is a matter that has to be decided [110] from the circumstances themselves. It would seem to me that some latitude should be

(Testimony of James F. Swinfard.)

allowed, and it becomes a matter of degree. Now, I have had this case, and I have had these questions many times in accident cases, railroad accidents, where the railroad employees are talking to one another right after the accident has occurred, and it may take the conductor three or four or five minutes to walk from his end of the train and to get up to the engineer, and he says, "What happened?" And the engineer then says thus and so. I admit those as *res gestae*, because under those circumstances the conversation couldn't have occurred before, and the parties who are involved in it are the men who have been operating the equipment. So as to the time involved in these matters, I have always taken the position that it depends upon what kind of a situation occurred.

Mr. Murray: I think perhaps we have one additional factor here, your Honor. Mrs. Harrington called the police in order to report what happened, and this was her purpose in calling them, of course, and also to get an ambulance for Mr. Harrington, naturally. I think this is significant.

The Court: I think where there has been a homicide of some kind, a death of some kind, I think it's a perfectly natural thing. In fact, if I may be a little corny about it, the thesis of the rule is "Doin' what comes naturally." That is just the basis behind it. Because it is the natural [111] thing to do, the probabilities favor its truth.

Mr. Murray: I suppose that is true, your Honor. But I think your Honor agrees also that what is

(Testimony of James F. Swinfard.)

called the guarantee of trustworthiness in this type of situation is that the speaking of the witness is close enough to the scene so that you can be sure they are dominated by what has happened.

The Court: Oh, I recognize that and it becomes a matter of degree. I understand your position, and I will overrule the objection on the ground that I think this is still within the period of time when a person is speaking under the stress of the occurrence, and therefore this is not a planned and deliberate type of thing, although I admit this is getting into the exterior limits. But I have to exercise my judgment, so I will overrule the objection on that theory.

Mr. Murray: All right, your Honor.

The Court: Now, the question was, you asked her what happened, and what did she say to you.

The Witness: May I refer to my notes?

The Court: Yes, certainly. And if you desire to see the notes, Mr. Murray, you may certainly examine them.

Mr. Murray: Thank you, your Honor.

The Witness: Mrs. Harrington said, "My husband just shot himself, but he didn't mean it."

Mr. Murray: Your Honor, I think the testimony of Officer Swinfard has just demonstrated my position on the *res gestae* [112] point. But it also raises another point, which is that Mrs. Harrington's statement that her husband didn't mean to shoot himself, I suppose is a conclusion of the purest sort. Therefore I move to strike it on that ground.

(Testimony of James F. Swinfard.)

Mr. Decker: It seems to me the statement is admissible on the spontaneous declaration basis of its not being hearsay. And then with respect to its being an opinion or conclusion, it is admissible insofar as it shows the state of mind of the declarant at that time. It is not offered for the purpose of proving the fact asserted, but it is offered for the purpose of showing what Mrs. Harrington's state of mind was at that time.

The Court: I smile because I have been arguing with myself about what "state of mind" means in this situation, and I am in the middle of reviewing the authorities. I don't want to appear to be facetious about this thing, but you put your finger on what is a rather difficult subject at the moment.

I think what I must do now is to overrule the objection and leave the testimony subject to a motion to strike. I want to parse this question about "but he didn't mean it" aspect, as to whether that is a conclusion which is not admissible, Mr. Murray, and so I will leave the motion to strike standing on the same ground, and if we have to examine the matter further I will ask for authorities on it.

Frankly, I am inclined to agree with Mr. Decker, and [113] under the broad rule of admissibility under Rule 44, I think it may fall within one of the exceptions. But I will overrule the objection and leave the motion to strike on the same grounds on which the objection has been offered, and if you have any additional grounds to offer, you may do so.

Mr. Murray: In all fairness to your Honor, I

(Testimony of James F. Swinfard.)

think I should say that I don't see any basis or any reason why Mrs. Harrington's state of mind is at all relevant at this point.

The Court: That may well be. I don't know. That is just one of the things I will have to ascertain.

Mr. Murray: And your Honor understands my objection runs to both grounds of hearsay, and opinion and conclusion and hearsay?

The Court: Yes.

Mr. Murray: Thank you.

Q. (By Mr. Decker): You went into the house then, Officer Swinfard? A. Yes, sir.

Q. And if you will look over your right shoulder there you will see a diagram which Mrs. Harrington has made of the house. So you will get the proper orientation, this is the front door.

A. Yes, sir.

Q. Now, referring to that diagram, tell us where you found the decedent, Mr. Harrington. [114]

A. Mr. Harrington was on the living room floor. The position of this diagram will be between "X-3" and the word "living."

Q. A position on this diagram between "X-3" and the word "living"? A. Yes, sir.

Mr. Decker: We will designate this as X-4. Would that be appropriate, your Honor?

The Court: Yes.

Q. (By Mr. Decker): Now, did you see Plaintiff's Exhibit 1?

The Court: The gun.

(Testimony of James F. Swinfard.)

A. Yes, sir.

Q. (By Mr. Decker): And where was it with reference to the diagram, again?

A. It was near the coffee table, between the coffee table and Position X-3 on this diagram, on the floor.

Mr. Decker: All right. I think we can make that X-5. Between the coffee table and X-4?

A. X-3.

Q. In this position? (Drawing on diagram.)

A. Yes.

Q. Now, Officer Swinfard, did you handle the gun at all? A. Yes, sir.

Q. I take it, then, that when you picked it up you observed its condition? [115]

A. Yes, sir.

Q. Was it cocked or uncocked?

A. I am not familiar with the weapon, sir. I can say that the hammer was back.

Q. The hammer was back?

A. I don't know whether it is cocked or uncocked in that position.

Q. The hammer was in that position (demonstrating)? A. Yes, sir.

Q. All right. Did you examine the gun?

A. Yes.

Q. Was it loaded or unloaded?

A. It was loaded, sir.

Q. And I take it there was one shell which had been used?

(Testimony of James F. Swinfard.)

A. We found evidence of one shell being expended, sir.

Q. The magazine was—I mean, was the magazine fully loaded except for that one shell?

A. I don't know, sir. It had nine rounds in the weapon.

Q. There were nine live rounds in the weapon?

A. Yes, sir.

Q. Officer Swinfard, where was the wound in the decedent's head?

A. There was actually two wounds. One was on the right side of his head and one on the left side of his head.

The Court: When you say the side, you mean in the area [116] of the temple?

A. Yes. On the right side in the area of the temple. On the left side it was slightly behind and above the left ear.

Q. (By Mr. Decker): Were you able to—well, withdraw that. Did you arrange for—well, withdraw that. Did an ambulance come while you were there? A. Yes.

Q. And the body was removed, or the decedent was removed? A. Yes, sir.

Q. I take it you left the scene thereafter?

A. After completing my investigation, sir.

Mr. Decker: I have no further questions.

The Court: You may cross-examine, Mr. Murray.

Mr. Murray: Thank you, your Honor.

(Testimony of James F. Swinfard.)

Cross-Examination

By Mr. Murray:

Q. Officer Swinfard, after you had arrived at the scene did you subsequently call other officers to come and assist you? A. Yes.

Q. Who were those officers?

A. Officer Tognetti, Officer Casey and Officer Adams.

Q. Will you give me those names again?

A. Officer Tognetti, T-o-g-n-e-t-t-i, and Officer Casey, David Casey, and Officer James [117] Adams.

Q. Now, you testified as to the location of some of the various objects in the room, Officer Swinfard. Did you make measurements to determine where those objects were located?

A. Yes, sir, I did, sir.

Q. Did you make any diagrams?

A. Yes, sir.

Q. Do you have those diagrams with you?

A. Yes, sir.

Q. May I see them, please?

Mr. Murray: I ask that these diagrams be marked in evidence as, I suppose, Defendant's Exhibits A-1 through -4, for identification.

The Court: Defendant's Exhibits A-1, -2, -3 and -4. There are four sheets?

Mr. Murray: Yes, there are four sheets, each showing a different perspective.

(Testimony of James F. Swinfard.)

The Court: Then they may be marked Exhibits A-1, -2, -3 and -4 for identification.

There is no objection to their going in evidence?

Mr. Murray: They will be identified later. Is there any objection?

Mr. Decker: There may be after I look at them.

Mr. Murray: I hadn't intended to offer them until the officer testified.

The Court: I understand that, but I was trying to [118] hurry it a little bit. You want them marked for identification at the moment?

Mr. Decker: I would prefer that at this point.

The Court: All right, they will be marked for identification first.

(Diagrams referred to were marked Defendant's Exhibits Nos. A-1, -2, -3, -4 for identification.)

Q. (By Mr. Murray): Officer, I wonder if you would please tell us very briefly what these sketches show, these Defendant's Exhibits A-1, A-2, A-3 and A-4?

The Court: Will you refer to them as A-1 for identification and so on?

The Witness: Yes.

The Court: Now, what is A-1?

The Witness: Diagram A-1 is a floor plan of a living room looking from the ceiling down. The top of the diagram would be in a westerly direction.

Q. (By Mr. Murray): And Diagram A-2?

(Testimony of James F. Swinfard.)

A. A-2 is a——

Q. (Interposing): You say the top of the diagram would be in a westerly direction?

A. Yes.

Q. I wonder if you could mark that at the top. And Diagram A-2 was what?

A. Diagram A-2 is a plan of the ceiling looking from what [119] would be the attic down. Again the top of the diagram is in a westerly direction.

The Court: You say it's a plan of the ceiling?

The Witness: Yes, sir.

Q. (By Mr. Murray): And A-3?

A. Diagram A-3 is the north wall of the living room.

Q. A side view of the north wall?

A. Yes, standing in the living room looking north, this would be the wall. And Diagram A-4 is standing in the living room, the east wall.

Q. A side view of the east wall?

A. Yes, sir.

Q. And, Officer Swinfard, do these sketches accurately portray the objects as you found them on the evening when you were called to the scene?

A. Yes, sir.

Mr. Murray: Your Honor, I would like to offer these diagrams in evidence at this time.

Mr. Decker: No objection, your Honor.

The Court: They will be admitted into evidence in accordance with the numbers with which they have been marked for identification.

(Testimony of James F. Swinfard.)

(Defendant's Exhibits A-1 through A-4 were received in evidence.)

Mr. Murray: Your Honor, at my request the South San [120] Francisco Police Department made a few Thermofax copies of Exhibit A-1. I am going to ask Officer Swinfard some questions about the diagrams, and Mr. Decker has no objection. Perhaps it will be helpful to your Honor to have this diagram before you. (Handing exhibit to the Court.)

The Court: All right.

Mr. Decker: I wonder if before we start it wouldn't be helpful for the officer to indicate on the diagram on the board the directions he has referred to so that they will coincide with the directions indicated in the exhibit?

The Witness: May I have my diagram to compare them?

Mr. Murray: Yes.

The Court: Well, I think it is pretty apparent, Mr. Decker. There may be some differences here as to what Mrs. Harrington has put on the board, but, generally speaking, I can match them up.

Mr. Decker: Yes, I can see that. I was only referring to the fact that for the first time the officer injected the descriptive device of directions into the record. We haven't had that before and I thought we might relate it to the diagram in order to clarify it.

The Court: Either his directions are right or

(Testimony of James F. Swinfard.)

wrong in terms of north and south; is that what you are talking about?

Mr. Decker: Yes.

The Court: East and west? [121]

Mr. Decker: Yes.

The Court: As I get it, he says the top of the diagram, just like the top of the diagram on the board, would be west.

Mr. Murray: Your Honor, I have no objection to any of this procedure, but I don't think the directions are important in the case.

The Court: No, I don't, either.

Mr. Decker: The top of the diagram——

The Court: Toward the top of the board is west?

Mr. Decker: ——is west.

The Court: Just the same as toward the top of the diagram on the paper is west. Isn't that correct, Officer?

The Witness: Yes.

Mr. Decker: Fine. Thank you.

The Court: Proceed, Mr. Murray.

Q. (By Mr. Murray): Officer Swinfard, directing your attention for a moment to Diagram A-1, the view of the scene of the room looking down, does the sketch or the diagram show the position of Mr. Harrington? A. Yes, it does.

Q. And is he indicated by the figure?

A. Yes, sir.

Q. And does the diagram show the couch?

A. Yes, sir. It's in the lower left-hand corner.

(Testimony of James F. Swinfard.)

Q. And it is this bent structure, the curved structure? [122] A. Yes.

Q. And does the diagram show the coffee table?

A. Yes, sir, directly in front of the couch.

Q. What does the word "highball" indicate?

A. There was a glass container on the table that contained a liquid substance that smelled like a highball.

Q. What do the words "cocktail sauce" indicate?

A. There was another glass container on the table that contained a red substance that appeared to be a tomato sauce or cocktail sauce.

Q. Does the sketch show the position of the gun?

The Court: That is not an alcoholic cocktail?

The Witness: Yes, sir.

Q. (By Mr. Murray): A shrimp cocktail?

A. Yes.

Q. Does it show——

A. (Interposing): The position of the gun is indicated next to the words "cocktail sauce."

Q. It looks like a little gun drawn on the floor there. A. Yes.

Q. By the way, you have indicated measurements on the diagram between the various objects?

A. Yes, sir.

Q. How did you arrive at these measurements?

A. These were taken with a fifty-foot steel tape. [123]

Q. And you recorded the measurements in your book? A. Yes, sir.

(Testimony of James F. Swinfard.)

Q. Does the sketch show the position of the spent cartridge?

A. Yes, sir. It is indicated by a little dot on the opposite arm of the couch near the measurement 13 feet 8 inches on the left-hand side of the diagram.

Q. I see. You have a little rectangle noted there and then a little dot, and that is the position of the spent cartridge? A. Yes, sir.

Q. Does this diagram show the position of the exit of the bullet from the room?

A. No, sir, this diagram does not.

Q. Does another diagram show it?

A. Diagram A-2 shows it.

Q. Diagram A-2? It shows the position from which the bullet exited from the room?

A. Yes, sir, that's right.

The Court: It went through the ceiling, did it?

The Witness: Yes, your Honor.

Q. (By Mr. Murray): Did you ever recover the bullet, Officer? A. No, sir, we never did.

Q. Where did it go?

A. Sergeant Biancinni went to the—— [124]

Q. What was that name?

A. Sergeant Biancinni, B-i-a-n-c-i-n-n-i. He went to the Harrington resident next day in an attempt to recover the projectile and found that it had gone through the ceiling of the living room and through the roof of the house and was lost.

Q. Officer Swinfard, did you take any photo-

(Testimony of James F. Swinfard.)

graphs of the scene as it was at the time? Did you take any photographs?

A. Yes, there were photographs taken.

Q. Do you have those photographs with you?

A. Yes, sir.

The Court: Do they have any particular order?

Mr. Murray: Yes, sir. The only order I have in mind is that I would like this particular photograph first. I ask that these photographs be marked.

The Court: They will be a B series. How many are there?

Mr. Murray: There are five.

The Court: Defendant's Exhibits B-1 through B-5.

(Photographs marked Defendant's Exhibits B-1 through B-5, inclusive, for identification.)

The Court: Is there going to be any objection to the photographs?

Mr. Decker: No, your Honor.

The Court: They will be admitted into evidence and you can identify them with the witness. [125]

Mr. Murray: Thank you, your Honor.

(Defendant's Exhibits B-1 through B-5 were thereupon received in evidence.)

Q. (By Mr. Murray): Directing your attention to Defendant's Exhibit B-1 for identification, what does this photograph show?

A. It shows the apartment, the coffee table and two glass containers and the couch.

(Testimony of James F. Swinfard.)

Q. And directing your attention to photograph B-2, what does that show?

A. This shows just about the same thing. It shows drapes in the background on the back wall, and the arm of the couch where the spent cartridge is lying can be seen in this photograph.

Q. And Exhibit B-3? What does that show?

A. This shows the weapon and the coffee table and the fireplace. It is just from a different angle.

Q. And Defendant's Exhibit B-4?

A. This shows part of the coffee table, the weapon, and the fireplace. It is taken from a different angle.

Q. And Defendant's Exhibit B-5?

A. This shows where Mr. Harrington's head was, the dark stairway area, and in the background is the weapon and the coffee table.

Q. Officer Swinfard, do these photographs accurately present the scene as you saw it that [126] evening?

A. Yes, they do.

Q. How long after—had the body been removed by the time these pictures were taken?

A. Yes, sir.

Q. In other words, this occurred some time after the occurrence and during the course of the investigation following the occurrence?

A. Yes, sir.

Q. Other than the removal of Mr. Harrington's body, though, I take it everything was as it was when you found it?

A. Yes, sir, it was.

Q. Once again directing your attention to De-

(Testimony of James F. Swinfard.)

pendant's Exhibit B-1, Officer Swinfard, this shows the gun, does it not? A. Yes, it does.

Q. And it shows the highball glass and the cocktail glass? A. Yes.

Q. And this was as the gun was, in that position, when you found it, as shown in this picture?

A. That's correct.

Mr. Murray: We are through with these for the moment, your Honor, if you would care to look at them.

The Court: Thank you. Nobody has asked you, and I don't know whether Mr. Murray intends to ask you, but when you examined the gun did you notice the position in which the safety of the gun was? [127]

The Witness: Yes, sir, the safety was in the back position.

The Court: That is, in the position of firing?

The Witness: I am not sure, sir.

The Court: You don't know which it is? In the down position——

The Witness (Interposing): Pulled back as the hammer was.

The Court: Show him the weapon.

Mr. Murray: Yes, your Honor.

The Witness: That is how the weapon was when we found it.

Mr. Murray: Let the record show the safety is in "fire" position——

The Court: Yes.

(Testimony of James F. Swinfard.)

Mr. Murray: And the hammer is fully drawn back.

The Court: Yes. Thank you.

Q. (By Mr. Murray): Officer Swinfard, did I request the Police Department to make an enlargement of Defendant's Exhibit B-1?

A. Yes, sir, you did.

Mr. Murray: May this enlargement be marked? Would you prefer to have it in the same series, your Honor?

The Court: This is an enlargement of Exhibit B-1, is it? [128]

Mr. Murray: Yes.

The Court: Let's call it B-6, then.

(Enlargement of B-1 was received in evidence and marked Defendant's Exhibit B-6.)

Q. (By Mr. Murray): Just a moment ago I asked you if I asked the Police Department to make an enlargement. Is this the enlargement?

A. Yes, sir, it is.

Q. Does it accurately portray the scene as you remember it on that evening? A. Yes, sir.

Mr. Murray: I would like to offer this enlargement in evidence as Defendant's Exhibit B-6.)

Mr. Decker: No objection.

The Court: If it hasn't already been admitted, it will be. It is in evidence.

Mr. Murray: Does your Honor care to see the enlargement?

(Testimony of James F. Swinfard.)

The Court: Hand it to my court clerk. And the safety side is down in that picture?

The Witness: Yes, sir, that is correct.

Q. (By Mr. Murray): Officer Swinfard, I would like to ask you just a few questions about the gun which you found upon the scene. What was the serial number of the gun?

A. The serial number was 844557. [129]

Mr. Decker: I hope that is the number on Exhibit No. 1.

Mr. Murray: It is my understanding that it will be, Mr. Decker.

Q. Does this appear to be the gun?

A. Yes, sir, this is the gun.

Q. You have described the condition of the gun when you found it and we have just been through that, and I believe you told us that you did unload the gun; is that right? A. Yes.

Q. And you found nine bullets in the gun?

A. Yes.

Q. Nine live rounds? A. That's right.

Q. And was one live round in the chamber, do you recall?

A. I can't—I'm not that familiar with the weapon. I couldn't say.

Q. And you found one spent cartridge?

A. Yes.

Q. Which would indicate the gun had at one time had ten rounds?

A. It would indicate that the gun had been discharged.

(Testimony of James F. Swinfard.)

Q. Now, what did you do with the gun, the expended shell and the nine bullets?

A. These were all taken to the station and tagged as evidence. [130]

Q. And were they kept at the station?

A. Until the time of the inquest.

Q. And then you gave them to the coroner?

A. Yes.

Q. Did the police test the gun in any way?

A. No, sir.

Q. Did the police do anything with the gun which might affect the mechanical condition?

A. No, sir.

Mr. Murray: That's all I have, your Honor.

The Court: Redirect examination.

Redirect Examination

By Mr. Decker:

Q. Officer Swinfard, have you had occasion to investigate homicides before?

A. I have investigated some homicides, yes.

Q. And as a result of your investigation of this case, did you formulate an opinion as to whether or not this was a suicide or an accident?

Mr. Murray: Your Honor, I am afraid the question calls for not only——

The Court (Interposing): Yes, sustain the objection.

Mr. Decker: That's all. Thank you, Officer.

The Court: That is all.

(Witness excused.) [131]

The Court: Do you have another witness or is this all?

Mr. Decker: Yes, we have Officer Tognetti here. I don't think he will take nearly as long as Officer Swinfard.

The Court: Well, in any event, we will stay until he is through. I am not going to make him wait over until this afternoon. Put him on and we will continue until he is finished.

Mr. Decker: Fine. That is what I had in mind.

PAUL A. TOGNETTI

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your full name to the Court.

The Witness: Paul Albert Tognetti.

Direct Examination

By Mr. Decker:

Q. Officer Tognetti, you are, as Mr. Swinfard, a police officer employed by the South San Francisco Police Department, are you not?

A. Yes.

Q. And you also were called to 716 Spruce Street, San Francisco, on the evening of February 5, 1960?

A. Correction: It is South San Francisco.

Q. Did you go there in the company of some other officers? A. Yes, sir.

Q. Who was that? [132]

(Testimony of Paul A. Tognetti.)

A. I believe the sergeant.

Q. What is his name?

A. (Unintelligible to the reporter.)

Q. And when you arrived there were there other officers present? A. Yes, there were.

Q. Who were they?

A. I believe it was Officer Swinfard, Casey and Adams.

Q. I see. Was Mrs. Harrington present when you arrived at the scene?

A. I don't recall whether she was or not.

Q. How about the children?

A. I think the children had left. They were over at the neighbor's house.

Q. They were at the neighbor's house by this time? And Mr. Harrington, the deceased, was he still there?

A. I believe I arrived as the ambulance had taken off. I could hear the ambulance taking off.

Q. It is your recollection that the ambulance was just leaving when you arrived? A. Yes, sir.

Q. Mr. Tognetti, would you describe briefly for us the appearance of the home as you observed it when you went in to make your investigation?

A. It was very much like Officer Swinfard described it, and [133] I did notice the pool of blood the victim had lost.

Q. And what did you observe about the degree of order or disorder in the house itself?

A. The house appeared to be very well kept, very neat.

(Testimony of Paul A. Tognetti.)

Q. You saw no indication that there had been a struggle or anything of that kind in the living room?

A. No, sir.

Q. Did you see a gun collection in the house?

A. Yes, sir.

Q. Where was that?

A. I believe it was in the living room on the far wall.

Q. How many guns were there?

A. Oh, let's see. I don't recall exactly. I think there was, oh, four or five rifles and a few revolvers.

Q. Mounted on the wall?

A. Yes, in a case.

Q. I see. A. A collection.

Q. What about radio equipment? Did you observe any radio equipment in the house?

A. Yes, he had some sort of a ham station.

Q. Where was that located?

A. I can't recall.

Q. You remember seeing it?

A. I remember seeing it, yes, and I remember seeing this [134] great big antenna on the outside of the home also.

Q. I see. Did you observe the glass with what Officer Swinfard referred to as a highball?

A. Yes, sir.

Q. Am I correct in my understanding that there were just the glass, maybe half full of liquid. on the coffee table?

(Testimony of Paul A. Tognetti.)

A. It was just as the officer had described it, as far as I can recall.

Q. And this is all you saw in the way of what looked like what may be a drink around the living room?

A. Yes, sir.

Q. What was your job, so far as the investigation was concerned? What did you do?

A. Usually we worked as a team. We assist each other, and more or less we have occasion to work on similar incidents in the past and usually we——

Like this particular case, Officer Swinfard arrived there at the scene first and he made the measurements and everything else, and I sort of got cued in because I had arrived there late, and I had to find out what was going on, and there was another officer there assisting with the measurements and everything else, and I assisted for a few minutes and then discussed if there were any other persons for statements, and everything else, and it was stated that the boy was in the room and I said, "Fine. You take care of this situation and I [135] will take care of the statements," and I immediately left the scene to go to the neighbor's house to talk to the boy.

Q. You questioned Arnold, Jr., at the neighbor's house?

A. Yes.

Q. Took a written statement from him, did you?

A. Yes, sir.

Q. And what else did you do?

A. I took the statement of the boy, and we usually like to get all the statements of anybody

(Testimony of Paul A. Tognetti.)

that has any bearing on the case as soon as possible. It's a known fact that when they are mostly upset and everything else, the truth is mostly apt to be there, and if you wait a day or two later they might have time to prepare a story.

Q. Yes?

A. So with that intent in mind, to get the statements, to get the truth of what actually happened, I went over to the neighbor's house and interrogated the boy.

Q. Yes?

A. And I believe he had just gone to bed, but it hadn't been too long, and I discussed the situation with him, and at the time he did not believe his father was dead.

Mr. Murray: Your Honor, just a moment——

Mr. Decker: Yes, just let me——

The Court: That part of it may go out. Now, what is the purpose of this? [136]

Mr. Decker: First of all, the answer isn't responsive. I just asked him what he did.

Q. I take it you went next door and you took a statement from Arnold, Jr.? A. Yes, I did.

Q. And after you had completed getting the statement from him did you get another statement or do any more work?

A. I went back to the scene, and later on I (unintelligible) took the statement of the wife at the hospital.

Q. You took a statement from Mrs. Harrington

(Testimony of Paul A. Tognetti.)

at Kaiser Hospital in South San Francisco, is that right? A. Yes.

Q. And that concluded your investigating work that evening? A. Yes.

Q. Now, Officer, do you have with you the written statements that you took from Arnold, Jr., and from Mrs. Harrington? A. Yes, I do.

Q. What did Arnold, Jr., tell you?

Mr. Murray: Your Honor——

The Court (Interposing): Do you want to object to that, Mr. Murray?

Mr. Murray: Well, your Honor, I think we have the statements here.

The Court: Well, I want to get more basic. Do you have an objection to the statements going in evidence? [137]

Mr. Murray: Just a moment, your Honor. Let me look at them and then I will let you know.

The Court: Surely. Because if the argument is about which is the best evidence, then I think the statements themselves, rather than the testimony of this witness as to what was said; but if the argument is whether or not the statements themselves are admissible, either as reported orally or as written, then I want to hear the argument on that.

Mr. Murray: Your Honor, I think that when offered by Mr. Decker, that it is clear that the statements are not admissible under the hearsay rule. However, in cases of this sort, in a trial by the Court, I have no desire to conceal from your Honor the facts of the case.

(Testimony of Paul A. Tognetti.)

The Court: Oh, it isn't a question of concealment from me. I am not concerned about that, and I don't think there is any——

Mr. Murray (Interposing): I am particularly concerned about portions of Mrs. Harrington's statement. Might I suggest that the statements be identified——

The Court (Interposing): Oh, they can be marked for identification, certainly.

Mr. Murray: ——and that at the time they are offered——

The Court: But I think we are running into hearsay statements that are now getting a little remote. The boy's might come close enough, but you have Mrs. Harrington's [138] statements immediately following, or upon the arrival of the first officer, and now you are getting into a period of time when she has had an opportunity to become conditioned by talking to a number of people, and I think a statement taken at the hospital would be highly objectionable because of the passage of time, and, therefore, I would be inclined to rule, Mr. Decker, that the statement of Mrs. Harrington is not admissible.

Now, then, I am even a little dubious about the boy's statement, but if it will eliminate the necessity of bringing the boy here, why, I will take his statement because I don't want him in the courtroom any longer than he has to be.

Mr. Murray: That is what I had in mind, your Honor.

(Testimony of Paul A. Tognetti.)

Mr. Decker: Let me suggest that—well, first, I will defer to your Honor's ruling with respect to Mrs. Harrington's statement.

The Court: Yes. Well, I think it is in the questionable area where I would rule unfavorably to you or against your desire to offer it, just as your statement insofar as Officer Swinfard was concerned, which was in a rather questionable area but on which I would rule in your favor.

Mr. Decker: I understand perfectly, your Honor.

The Court: The line of demarcation, I think, is crossed here, so I would rule that way. But as to the boy, I am not prepared to say that this is not a declaration that was made as [139] a part of the **occurrence**. But let's put it this way: If it can substitute for his appearance and there is no objection, I think I can consider it because there is nothing constitutional about it. You gentlemen can stipulate it can be admitted into evidence.

Mr. Decker: Let me suggest that, in order to avoid the necessity of having Arnold, Jr., testify in court about this incident, that this statement be admitted into evidence pursuant to stipulation of counsel and that also his deposition which was taken be placed in evidence by stipulation.

The Court: Any objection, Mr. Murray?

Mr. Murray: I think, your Honor, I would be in favor of such a stipulation, but, if it please the Court, I would like to think about it over the lunch hour.

The Court: You may do so. Now, how about the

(Testimony of Paul A. Tognetti.)

statement insofar as the officer is concerned, because I don't want to hold the officer here?

Mr. Murray: I think, your Honor, we should identify both statements at this time so that we have them here.

The Court: All right. We will mark Arnold, Jr.'s, statement as Plaintiff's Exhibit 4. It will be marked for identification as Plaintiff's Exhibit 4.

(Statement of Arnold, Jr., was marked Plaintiff's Exhibit No. 4 for identification.)

The Court: And the statement of Mrs. Harrington will [140] be marked Plaintiff's 5 for identification.

(Statement of Mrs. Harrington was marked Plaintiff's Exhibit No. 5 for identification.)

The Court: Now may I ask you, Officer Tognetti, in this statement taken by the boy, is this in your handwriting?

The Witness: Yes, your Honor.

The Court: In other words, you questioned him, he gave you answers and you wrote down what he had said in narrative form?

The Witness: Yes, sir.

The Court: Did he then read it himself or did you read it back to him?

The Witness: I read it back to him.

The Court: Did he sign it?

The Witness: Yes, he did.

The Court: Did he make any corrections in the statement?

(Testimony of Paul A. Tognetti.)

The Witness: No. I believe I read it back several times to make sure that he fully understood what he was signing.

The Court: He was an eleven-year-old boy?

The Witness: I believe he was twelve at that time.

The Court: Did he appear——

The Witness: He appeared a very intelligent boy for that age. A very, very intelligent boy for that age.

Q. (By Mr. Decker): And you have been referring in your responses to his Honor's questions to this written statement [141] which I am showing you now, which is marked Plaintiff's Exhibit 4?

A. That's right. Correct.

Mr. Decker: Thank you. I have no further questions of Mr. Tognetti.

The Court: Any cross-examination?

Mr. Murray: I think this will be very brief, your Honor.

Cross-Examination

By Mr. Murray:

Q. Officer, you have told us the circumstances under which you took a statement from Arnold Harrington, Jr. Were the circumstances of taking Mrs. Harrington's statement similar?

Mr. Decker: Just a minute. I am going to object to this as being outside the scope of the direct examination. Your Honor has ruled with respect to her statement and I have deferred to your

(Testimony of Paul A. Tognetti.)

Honor's ruling. The statement will not be in evidence.

The Court: All right. It has been identified, but it is not in evidence, if you have offered it in evidence.

Mr. Murray: Your Honor, I believe the statement has been identified.

The Court: It has been identified, but it is not in evidence, and I don't intend to admit it in evidence unless you stipulate. [142]

Mr. Murray: Your Honor, I think portions of the statement are admissible in evidence and portions are not. At this time I just wanted to establish——

The Court: You mean is it admissible in evidence as——

Mr. Murray: As admissions.

The Court: As admissions. Well, I will overrule the objection. He can do this on direct, anyway, and I am not going to require this officer to be trotting back and forth here, so you can proceed to lay the foundation.

Q. (By Mr. Murray): Tell the circumstances under which you took Mrs. Harrington's statement.

A. It was taken at Kaiser Hospital in the waiting room.

Q. And she told you the story, is that right?

A. Well, I questioned her first and then she made these statements afterwards.

Q. And the statement, is it in your handwriting or hers? A. Yes, it is.

(Testimony of Paul A. Tognetti.)

Q. In yours or hers?

A. I believe it is in mine.

Q. And she signed it? A. Yes.

The Court: If the officer wants to examine the statement, he may.

A. I have to look at it. It is a question of time. Right, it was in my handwriting and she signed it. [143]

Q. (By Mr. Murray): Did she read the statement before she signed it? A. Yes, she did.

The Court: Let me be clear on this. Did you read it to her or did she take it and read it?

The Witness: I read it and I handed it to her.

The Court: And did she read it again?

The Witness: She read it again and signed it.

The Court: Did she make any corrections?

The Witness: No, I don't remember any corrections.

The Court: In taking this statement, was there any discussion, insofar as Mrs. Harrington was concerned, about whether this was free and voluntary, or was she advised as to any rights she might have not to make a statement, or was the subject even discussed?

The Witness: Well, we usually discuss that we like to have a statement if we may in order to clarify or make our records more complete.

The Court: This is the way you put it to her?

The Witness: That is the way we usually like to have the statement—"if you wish, if we may, and your signature, if you please," words to that effect,

(Testimony of Paul A. Tognetti.)

and most cases, if they do deny, we don't put any pressure on them either way.

Mr. Murray: That is all I have, your Honor.

The Court: Do you have any further redirect examination? [144]

Mr. Decker: No, I haven't, your Honor.

Mr. Murray: Your Honor, I would like to say one thing. There is some slight possibility, I would suppose, that we might want to recall Officers Swinfard and Tognetti should the time come to present our case.

The Court: That's up to you. Do you have them under subpoena?

Mr. Murray: I have Officer Swinfard under subpoena, your Honor. I don't have Officer Tognetti under subpoena.

The Court: Do you want them ordered to remain this afternoon?

Mr. Murray: No, your Honor. I was going to suggest that I would like you to order them to if we communicate with them by telephone and ask them to return, that they should.

The Court: Well, can you do that? I don't want to keep these men waiting and away from their jobs any longer than we have to.

Mr. Murray: I understand. That is why I suggest they go now.

The Court: Well, I will leave it on that basis, Officer.

The Witness: We would appreciate sufficient time ahead of time.

(Testimony of Paul A. Tognetti.)

The Court: I understand. If this occurs, you may face a delay until tomorrow, or something like that, but we [145] will leave it that way.

Mr. Murray: Thank you, your Honor.

The Court: That is just a calculated risk you will have to take.

Mr. Murray: Yes, sir.

The Court: You are excused, then, and if we need you further, why, counsel will have to try to contact you by telephone.

The Witness: Your Honor, I assume that—these are the only records for our personal file. I assume that after the trial is over we would like to have them back.

The Court: Yes. Is there anything other than the statements here?

Mr. Decker: The photographs and the diagram.

(Simultaneous colloquy between Court and counsel.)

The Court: It is all right to excise the portions that haven't been identified?

The Witness: What isn't needed in evidence we would like to have because as of the moment we have nothing in our files.

The Court: Can you gentlemen agree? It appears that there are only two pieces of paper here that are involved, is that right?

Mr. Decker: I think they should be removed and left here and the other returned to the officer. [146]

The Court: All right, separate them and turn

(Testimony of Paul A. Tognetti.)

back the others to the officers. Those are the officers' reports. Then when the matter is concluded, the other papers, the photographs, the diagram and the statements will be directed to be returned to the——

Mr. Decker: South San Francisco Police Department.

The Court: Well, I will return them to counsel with directions that they be returned.

Mr. Decker: All right.

(Witness excused.)

The Court: Now, then, Mr. Decker, other than the cross-examination and redirect examination of Mrs. Harrington, do you have any other evidence in this case?

Mr. Decker: I think not, your Honor.

The Court: Then your case should be concluded some time this afternoon?

Mr. Decker: Yes, sir.

The Court: Mr. Murray, I am trying to ascertain the length of time, because Mr. Decker believes on the conclusion of the testimony of Mrs. Harrington the case of the plaintiff will be rested and then it will be up to the defendant to go ahead.

Do you have any evidence to present or will you have any evidence to present? If so, will you be ready to go forward this afternoon? [147]

Mr. Murray: Yes to both questions, and I think it will be relatively brief.

The Court: Would it be advisable to recess until 1:30 so we won't be under any real time pressure.

or can we do it in the time left if we recess until 2:00 o'clock?

Mr. Murray: I think it might be best under the circumstances to recess until 2:00 o'clock, from the standpoint of my witnesses.

The Court: All right, then, we will recess until 2:00 o'clock.

(Whereupon, a recess was taken to 2:00 o'clock p.m.) [148]

Afternoon Session, 2:00 P.M.

JOYCE A. HARRINGTON

resumed the stand; previously sworn.

The Court: The record will show that the plaintiff, Mrs. Joyce Harrington, is on the stand for cross-examination. You may cross-examine.

Mr. Murray: Before proceeding, your Honor, I think there was a question left open this morning about whether Arnold, Jr.'s, statement and the deposition would be admissible, and I have thought about that, and I think in order to obviate the necessity of having the boy here, I would stipulate to the admissibility of both of those documents.

The Court: Is that agreeable to you?

Mr. Decker: That stipulation is accepted, your Honor.

The Court: All right, then, Exhibit 4 will be admitted into evidence on stipulation.

(Plaintiff's Exhibit No. 4, previously marked for identification, was received in evidence on stipulation.)

(Testimony of Joyce Antonia Harrington.)

The Court: Do you want the transcript of the deposition to be marked as an exhibit?

Mr. Murray: I think perhaps that might be best, your Honor.

The Court: This is the original?

Mr. Murray: Yes. [149]

The Court: Then it will be admitted into evidence as—well, do you want it as a defense exhibit or a plaintiff's exhibit? The plaintiff offered it originally. I think it makes no difference.

Mr. Murray: No, your Honor.

The Court: Then it will be Plaintiff's Exhibit 6 and will be admitted into evidence.

(Deposition of Arnold, Jr., was received in evidence and marked Plaintiff's Exhibit No. 6.)

Cross-Examination

By Mr. Murray:

Q. Mrs. Harrington, I am going to have to ask you a few questions this afternoon. I realize that this will be painful for you and I will try to be as brief as possible.

I think it might be helpful, Mrs. Harrington, if we could have just a bit more information about Mr. Harrington's hobby of collecting guns. Let me ask you just a few questions about that.

How long had guns been a hobby with Mr. Harrington, if you recall?

A. Ever since he was a child, I think.

Q. He had been firing guns since then?

(Testimony of Joyce Antonia Harrington.)

A. Yes. He had hunted squirrels and things in Iowa, as he told me before.

Q. How long had he been collecting guns as a hobby? [150]

A. Before we went to Panama, which was in 1950, I believe he had two, and he started then, I think. I am not very sure because I was never interested in it.

Q. At least it has been for some time?

A. Yes.

Q. Do you recall, Mrs. Harrington, how many guns Mr. Harrington had and of what type?

A. I don't know the total amount, but I can tell you the names of some of them.

Q. Well, let's start with, first, did he have some rifles? A. He had five rifles, I think.

Q. Of various types? A. Yes.

Q. And then I take it he had some hand guns?

A. Yes, he does. I mean he did.

Q. And what were the types of those?

A. He had a pair of Colts, a Unique French gun, a .32, a Browning, and a little small Colt—I don't know what it is called. He had a Standard King, or something like that, .22.

Q. A target gun, I suppose?

A. I suppose so. I don't know.

Q. Oh, I think that is sufficient, Mrs. Harrington. Now, where did Mr. Harrington buy his guns?

A. To the best of my knowledge, he bought them from Bob Chow's Hobby and Gun Shop. [151]

Q. It's a gun shop run by Mr. Chow?

(Testimony of Joyce Antonia Harrington.)

A. Yes.

Q. Now, I think you have told us that Mr. Harrington shot his guns at the rifle range once or perhaps twice a week?

A. Yes.

Q. And that was at Sharps Park, as I understand?

A. Yes.

Q. And that Arnold accompanied him to the range. Was Mr. Harrington a good shot, Mrs. Harrington?

A. Very good.

Q. Did he belong to any shooting club?

A. Only the South San Francisco Rod and Gun Club.

Q. And you have testified, I think, that he was quite familiar with his guns?

A. Yes.

Q. Where did Mr. Harrington keep his guns in the home?

A. The rifles were on the rack and the small wapons were in a box.

Q. And the rack was where?

A. In the hallway.

Q. Was that, looking at the diagram now—

A. Off the living room.

Q. Off the living room?

A. Yes.

Q. Somewhere in this area that I am indicating? [152]

A. Yes.

Q. I am indicating the wall between the dining room and the hallway. In this area here?

A. That is right.

Q. And you say the hand guns were kept elsewhere?

A. In the box.

Q. And where was the box kept?

(Testimony of Joyce Antonia Harrington.)

A. In a closet in our bedroom.

Q. And where did Mr. Harrington keep his ammunition?

A. Downstairs in the basement on a high shelf.

Q. Did anyone else in the house besides Mr. Harrington handle the guns in the home?

A. No.

Q. You didn't? A. No.

Q. And Arnold, Jr., didn't?

A. No, only when he allowed him to when they went hunting.

Q. When they went hunting? A. Yes.

Q. But in the house itself no one else did?

A. No.

Q. Did Mr. Harrington get out the guns frequently at home?

A. Yes, he would clean them.

Q. Did he ever play with the guns around the house?

A. What do you mean by "play"? [153]

Q. Well, for example, did he ever wear them around in a gun belt or anything of that nature?

A. I remember seeing him once only doing that.

Q. I think you have told us already you were apprehensive about the guns. Did you ever warn Mr. Harrington about the guns?

A. Each time he got them out to clean I always said to be careful with them, as a precautionary measure.

Q. Mrs. Harrington——

(Testimony of Joyce Antonia Harrington.)

The Court: May I interrupt? Did you ever object to having the guns in the house at all?

The Witness: No, not really.

The Court: When you say "not really," was there ever a discussion between you and Mr. Harrington as to whether you should have any weapons in the house at all?

The Witness: Well, no, I did not object to that.

The Court: Did you ever complain to him that the children might get hold of them and accidentally injure themselves or someone else?

The Witness: No.

The Court: You may proceed.

Mr. Murray: Thank you, your Honor.

Q. Did Mr. Harrington have any problems with his health, Mrs. Harrington?

A. No. All except, I think I said he had an ulcer. [154]

Q. He had an ulcer? A. Yes.

Q. And how long had he had the ulcer?

A. I don't quite know. I think he started with a nervous stomach or something, described it that way.

The Court: In respect to the ulcer, was it one which he was treating at the time this incident occurred or was it in a controlled condition at that time?

The Witness: At that time it had been almost cured, I would say.

The Court: Was he on a special diet?

The Witness: No.

(Testimony of Joyce Antonia Harrington.)

The Court: Was he taking any medication for it?

The Witness: Only when it bothered him.

The Court: Was he under the treatment of a doctor?

The Witness: No.

The Court: Had he been under treatment by a doctor about the condition at some time during his lifetime before this incident?

The Witness: Yes, two years before.

The Court: And the ulcer had been of at least two years' duration before the incident occurred?

The Witness: Yes.

The Court: So that it was in a relatively controlled condition at the time the incident [155] occurred?

The Witness: Yes. He had gained weight and he was feeling much better than he had ever felt.

The Court: Had he been having any symptoms from his ulcer just prior to the time this incident occurred, such as pains or——

The Witness: No. Occasionally when he ate the wrong combination of foods I think it would bother him, as it would bother me.

The Court: Well, but did he, just prior to the time this incident occurred, make any complaints about his ulcer or his stomach?

The Witness: Not that I remember.

The Court: If you have any questions in the light of the questions the Court asked, you may certainly explore it.

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: Thank you, your Honor. I think your Honor has explored the situation.

Q. Mrs. Harrington, on the 5th of February, you have told us, I believe, that Mr. Harrington had been home from work with a reaction to a flu shot? A. Yes.

Q. And that you and your friend had gone to Chinatown, and that because you overstayed, Mr. Harrington had become angry—somewhat angry with you? A. Yes.

Q. Was there any other reason why Mr. Harrington was [156] upset?

A. No, that was the only reason, outside of the fact that he had prepared supper for me as a surprise and I wasn't there to eat it.

Q. Mrs. Harrington, had you been planning to go to the 1960 Olympics? A. Yes.

Q. When did you plan to leave?

A. I went to the tryouts in 1959, and because I was chosen to go to the tryouts I was automatically chosen to go to the 1960 Olympics.

Q. When would you have left, if you had gone?

A. About the 14th of February.

Q. Was Mr. Harrington upset about this?

A. No. He encouraged me very much, in fact.

Q. Who was to look after the children while you were gone?

A. He would because he was going to take two weeks off during the time I was gone.

The Court: Which Olympics were you going to? The Winter Olympics?

(Testimony of Joyce Antonia Harrington.)

The Witness: Yes.

The Court: At Squaw Valley?

The Witness: Yes.

The Court: That is not the Summer Olympics in Rome?

The Witness: No. [157]

The Court: You are talking about the Winter Olympics?

The Witness: That is right.

The Court: The Court can take judicial knowledge that Squaw Valley is in the mountains of California.

Mr. Murray: Yes, your Honor, that is right.

The Court: It is not a great journey from your home in South San Francisco, whereas going to Rome, Italy, for the track and field and other competitions would have been a much longer trip.

Q. (By Mr. Murray): Mrs. Harrington, I am going to have to ask you just a few questions about the tragic events themselves. Again, I will try to be brief.

Now, on this evening, prior to the time that Mr. Harrington injured himself, you have told us, I believe, that you were seated on the couch and that Arnold was in the chair, as you have indicated, between the dining room and the living room?

A. Yes.

Q. Now, as I understand it, the quarrel was continuing, at least as far as Mr. Harrington was concerned?

A. Yes.

Q. But you would not respond?

(Testimony of Joyce Antonia Harrington.)

A. That is correct.

Q. Then Mr. Harrington was seated on the couch in the place you have indicated? [158]

A. Yes.

Q. And then, I take it, he got up to get the Mauser automatic? A. Yes.

Q. Do you know how long he was gone?

A. No, I don't, because I was watching television while this was going on.

Q. Where did he go to get the gun, do you know? A. In the bedroom.

Q. And upon his return, what did he do?

A. I think he was just cleaning it, polishing it.

Q. With the chamois that you have told us about? A. Yes.

The Court: May I ask a question here about this Mauser pistol?

Mr. Murray: Of course, your Honor.

The Court: Was this Mauser pistol one of his collection, and was it used for any other purpose than just a part of a collection?

The Witness: It was only used as part of his collection and it was the most recently acquired gun.

The Court: Did he use it for safety purposes in addition to having it as part of the collection? In other words, did he have it as a weapon around the house that he would use to protect the household in the event an incident [159] occurred?

A. No, because he had remarked on how well the gun was put together, and that they didn't use any

(Testimony of Joyce Antonia Harrington.)

screws, or some kind of device to hold it together. It was fitted.

The Court: Yes. But I mean, did he have a gun around that he kept in a stand beside the bed, or something that he would use as a defensive weapon around the house?

The Witness: Yes.

The Court: What gun was that?

The Witness: That was the French gun, the Unique.

The Court: He kept it rather than the Mauser for defensive purposes?

The Witness: That's right.

The Court: And the Mauser was just a part of his collection which he used and which he shot from time to time in target practice or when he was engaged in rod and gun activities?

The Witness: I don't know whether he had ever shot that one.

Q. (By Mr. Murray): Then I think you told us that Mr. Harrington stood up with the gun.

A. You mean after he left the house and came back?

Q. No, I am talking now about the moment immediately before he injured himself, before the incident.

A. Yes, he stood up. [160]

Q. Then you saw him stand up, did you?

A. Yes.

Q. What did he do then? Did he move in front of you?

A. Yes. He was talking to me, and so he moved

(Testimony of Joyce Antonia Harrington.)

from his seat and he just walked around and stood in front of me.

Q. To the place you have indicated there?

A. Yes.

Q. In which hand was he holding the gun?

A. I believe it was in his right hand.

Q. And then you testified that he commenced making the clicking noise with the gun. Now, did he make this noise with the right hand?

A. I wasn't—I wasn't looking at him. If you remember, I wouldn't look at him because I was angry, and so I couldn't tell you. I assume it was with the right hand.

Q. Well, Mrs. Harrington, perhaps you just don't remember at this time. I think that when we discussed this question during your deposition you indicated that the clicking was being produced with only the right hand.

The Court: That is what she says she thinks now, but she says she isn't sure. But you can certainly question her about what she said.

Q. (By Mr. Murray): I would just like to show you this place in your deposition, Mrs. Harrington, and I would like to read it to you: [161]

“Question”——

Mr. Decker: What page, counsel?

Mr. Murray: This is on page 45. I am sorry, Mr. Decker.

“Q. Was the clicking being produced with only the right hand? A. Yes.

(Testimony of Joyce Antonia Harrington.)

“Q. The left hand was not assisting in producing the clicking? A. No, I don’t think so.”

The Court: Do you remember making those answers to those questions at the time the deposition was taken, Mrs. Harrington?

The Witness: I suppose I must have done it. But I know now that—at the time you took the deposition I had never been through anything like that and I was very apprehensive, but when I look back upon it now, I didn’t look at him because I was angry with him and he could have. I don’t remember.

The Court: But the best recollection you have now and the impression you have is that he was using his right hand rather than both hands?

The Witness: I am not going to say that I know for sure.

The Court: Well, I am not asking if you know for sure, [162] I am asking if it is your impression.

The Witness: Yes, it is my impression.

The Court: Now I would like to ask you how big a man was Mr. Harrington. What was the height and weight and physical appearance of Mr. Harrington?

The Witness: He was five feet eleven and he weighed—he was rather slight for his height, and so he weighed about 145 to 150.

The Court: His hands and feet, were they large or small?

The Witness: No, he was a perfect standard, I will say.

(Testimony of Joyce Antonia Harrington.)

The Court: Well, he had the hands of a professional man and not the hands of a working man?

The Witness: No.

The Court: You mean he had the hands of a professional man?

The Witness: Yes.

The Court: He wasn't a horny-handed man like a pick-and-shovel man, was he?

The Witness: No, his hands were very smooth.

The Court: That is all I have at present.

Mr. Murray: Thank you, your Honor.

Q. Mrs. Harrington, how rapidly was this clicking taking place? [163]

A. It went—I think I indicated to you before.

Q. Yes, I believe you did. I wonder if you could just do it now for the Court.

A. Yes, sir. It went one-two-three-four-five——

Q. I think perhaps you indicated it was going a little bit more rapidly than that during your deposition. Perhaps you can't recall?

A. I can't recall.

The Court: I might interpose that I think that might vary from time to time. I don't know how accurate a person can be on that, Mr. Murray. That is a pretty hard memory test.

Mr. Murray: It is, I am sure, your Honor.

The Court: What you are trying to convey to us is that it was fairly rapid; is that the idea? I don't mean just bing-bing-bing, like that.

The Witness: No. It was continuous, I would say.

(Testimony of Joyce Antonia Harrington.)

The Court: Yes. That is what I meant by fairly rapidly.

Q. (By Mr. Murray): Well, during your deposition, Mrs. Harrington, we concluded, I guess, that it was about twice a second. Would you say that's an accurate statement?

A. Well, to tell the truth, I don't know exactly how twice a second would sound.

Q. You do recall this discussion in your deposition? [164]

A. Yes, I remember your asking me how fast he was going.

Q. Mrs. Harrington, how was this clicking being produced?

A. I don't know. What do you mean?

Q. Well, as far as the gun is concerned.

A. I don't know.

Q. How was the mechanism of the gun being manipulated to produce the clicking?

A. I don't know, I am sorry.

The Court: All you have a recollection of is the kind of sound you heard?

The Witness: That is right.

The Court: You don't know how he was producing it?

The Witness: No.

Q. (By Mr. Murray): While the clicking was going on, Mrs. Harrington, where was the gun pointed? A. I assume at the ceiling.

The Court: You say you assume that?

(Testimony of Joyce Antonia Harrington.)

The Witness: Yes. I didn't look at him so I don't know.

Q. (By Mr. Murray): Mrs. Harrington, I realize it has been a long time since this happened, and again perhaps some of it doesn't come back quite as well as it might. I think when we took your deposition we discussed this point and at that time you told us the gun was pointed at the floor while he was clicking it. [165]

Mr. Murray: Mr. Decker, this is on Page 40.

Mr. Decker: Thank you.

Q. (By Mr. Murray): Starting at the top of the page, Mrs. Harrington, the deposition reads:

“Q. When you first noticed him standing there with the gun, what was he doing at the time?

“A. I suppose he was clicking it.

“Q. Where was the gun pointed then?

“A. On the floor.”

A. That was when he was standing, but not when he was sitting.

Q. That is what we are talking about now, Mrs. Harrington, when he was standing. A. I see.

The Court: When he was standing there clicking the gun, he had it pointed at the floor?

The Witness: Yes.

The Court: But you don't know where he was pointing it when he was sitting?

The Witness: No.

Q. (By Mr. Murray): Well, now I am talking about when he was standing there, Mrs. Harrington, in front of you.

(Testimony of Joyce Antonia Harrington.)

The Court: You understand the question? She said that he was pointing it at the floor.

Mr. Murray: Yes, I understood the answer, your Honor. [166]

The Court: Now, is there any conflict in that testimony?

Mr. Murray: No, not at all, your Honor.

Q. So you were observing him when he was standing there with the gun?

A. I only glanced at him.

Q. And do you know how the clicking was being produced at that time?

A. No, I don't, because I purposely averted my eyes. It's something I don't like, I just—well——

Q. Now, later, I believe you told us, he pointed the gun at his head.

A. Yes, when he said, "I will prove it to you."

Mr. Murray: Your Honor, I am afraid I will have to move to strike that last portion of the answer as nonresponsive.

The Court: I am afraid that I have to say that it is responsive in time.

Mr. Murray: I asked her if he pointed the gun to his head——

The Court: Yes.

Mr. Murray: ——and the answer to that would have been yes.

The Court: All right, I will grant the motion because it is in evidence already. That is, it is being considered. [167] It is subject to an objection already.

(Testimony of Joyce Antonia Harrington.)

All right. I will strike that portion of the answer without, however, affecting the question of admissibility as to when it was offered at other times. But for this answer, and for the purpose of this answer, I will strike it.

Mr. Murray: Thank you.

Q. Now, did you see him point the gun at his head, Mrs. Harrington?

A. I think he had told me that, yes.

Mr. Murray: I take it the same ruling applies?

The Court: Yes.

Mr. Murray: Fine.

The Court: The answer is, you saw him put the gun to his head?

The Witness: But that is why I looked at him, because he said that.

The Court: Well, yes, but the point is, and the only question that has been asked is did you see him.

The Witness: Yes.

The Court: You said yes, and that is the end of it. Yes or no. It doesn't require further explanation. You have already explained.

The Witness: I see.

Q. (By Mr. Murray): Did you see him, Mrs. Harrington, adjust the mechanism of the gun in any way before pointing it [168] to his head?

A. No, I did not. I did not notice him doing anything.

Q. You weren't watching him, is that it?

A. I was not watching him.

(Testimony of Joyce Antonia Harrington.)

Q. Now, when the gun was pointed to his head, Mrs. Harrington, was it in his right hand?

A. Yes.

Q. And it was pointing to the temple?

A. Yes.

Q. And where was the left hand?

A. I didn't notice.

Q. Was the left hand touching the gun?

A. I didn't notice. I don't know.

Q. You don't know whether the left hand was up like this? (Indicating.)

A. No, I don't know.

Q. Now, Mrs. Harrington, while the gun was pointed by Mr. Harrington at his head did you hear this click again prior to the discharge of the gun?

The Court: Now, let's get this in sequence of time or in terms of time as clearly identified as possible. You mean immediately before the explosion?

Q. (By Mr. Murray): I am speaking about, now, did Mr. Harrington point the gun at his head more than once, Mrs. Harrington? [169]

A. No.

Q. And the time when he did point it at his head was immediately before the explosion?

A. Yes.

Q. I am referring now to that time when I ask you, when he pointed the gun to his head before the explosion, did you hear any clicking noises from the gun?

(Testimony of Joyce Antonia Harrington.)

A. No, because that is when it went off.

The Court: And you heard nothing but the explosion?

The Witness: That is right.

Q. (By Mr. Murray): Are you sure of that, Mrs. Harrington?

A. Yes, I am sure of that.

Q. Mrs. Harrington, do you recall talking to Officer Tognetti? A. Yes.

Q. The gentleman who was there shortly after the event? A. Yes.

Q. At the hospital, I believe it was?

A. Yes.

Q. And do you recall telling him what happened?

A. Well, I know that I was in the waiting room and he came in to talk to me, but if he did let me read the statement, I never read it, so I don't know—I mean, I was just answering questions that he would put to me.

Q. Well, we will come to that in a moment, Mrs. [170] Harrington. Did you give a statement to Officer Tognetti? A. Yes, I did.

Q. I show you Plaintiff's Exhibit 5 for identification and ask you if this is the statement?

The Court: You may take time to read it, Mrs. Harrington, and identify it as to whether it is your signature and what purports to be said in the statement.

The Witness: Yes, this is my statement.

(Testimony of Joyce Antonia Harrington.)

Q. (By Mr. Murray): And this is your signature?
A. Yes.

Q. Now, is there a statement there, a sentence——

The Court: You can read it. She says that's her statement, and you can question her about it. But just read it to her and she can say that you are reading accurately from the statement, Mr. Murray.

Mr. Murray: All right, your Honor.

Q. There is a sentence in the statement, I believe, which reads: "He clicked it about six times and then it went off. I was sitting on the couch and he was standing by the end table facing me with the gun in his right hand."

Now, does this statement refresh your memory about it?

Mr. Decker: Your Honor, I submit that this is not an impeaching statement.

The Court: Well, it might or it might not be. Let her tell us what it is. [171]

Mr. Decker: All right.

The Court: What I want to know is what you meant by clicking it five or six times before it went off?

Mr. Murray: "And then it went off."

The Court: Yes, "and then it went off." Now, what did you mean by that statement?

The Witness: I can only tell you from recollection that if he had pointed the gun at his head before and if he was clicking the gun while it was

(Testimony of Joyce Antonia Harrington.)

pointed at his head, I would never have allowed it. I would have done something to stop him.

The Court: No, we are not asking what you would have done. We are asking what you meant by that statement.

The Witness: It leads to the statement, your Honor.

The Court: In other words, what you are trying to tell me is that when you told Officer Tognetti—is that right? Officer Tognetti?

Mr. Murray: Yes, your Honor.

The Court: —that it was clicking, that he clicked it five or six times before it went off, you mean he was clicking it while he was either sitting down or standing up before you, but before he put it to his head?

The Witness: Yes, your Honor.

The Court: That is what you meant?

The Witness: Yes. [172]

The Court: He clicked it four or five or six times before he put it to his head?

The Witness: Yes. The total amount of clicking.

The Court: And then he put it to his head and without any clicking the gun went off?

The Witness: Yes.

The Court: Is that what you were saying, what you meant by that statement?

The Witness: Yes.

The Court: All right, now, you may cross-examine further.

(Testimony of Joyce Antonia Harrington.)

Mr. Murray: I have no further cross-examination, your Honor.

The Court: The statement itself certainly—or that portion of it is in the record and she has a right to explain, and she does, and you may cross-examine her further as to what she means by it.

Mr. Murray: Of course, your Honor, my only thought here is that it is obviously of some importance how these things happened.

The Court: Yes.

Mr. Murray: I am trying to find out the circumstances.

The Court: I have absolutely no quarrel with your method of approach, Mr. Murray. All I want to find out is what did she mean, as far as I can ascertain. I will have to [173] weigh whether the statement as it is and the explanation create any variances that have to be appraised in arriving at a judgment on the facts here, and I don't want to foreclose you by my questioning from asking any questions you want to ask.

Mr. Murray: Of course not, your Honor. Thank you.

Q. Mrs. Harrington, I think you have told us that, and I just want to be clear on this—no, let me ask another question.

At the time that the gun was pointed to Mr. Harrington's head did you see what he did which led to the discharge of the gun, to the gun firing?

A. Pardon?

Q. At the time the gun was pointed at Mr. Har-

(Testimony of Joyce Antonia Harrington.)

rington's head did you see what he did which led to the gun firing? A. No, I didn't.

Q. Now, after Mr. Harrington's injury, you have told us, of course, that you summoned the police. And I think you have also told us that you didn't touch the gun in any way, so that when the police arrived the gun was in the same position as it was after it had fallen from Mr. Harrington's hand? A. Yes.

Q. Did you touch anything else in the room?

A. No.

Q. So that when the police arrived everything was in the [174] same condition as it was at the time? A. Yes.

The Court: Where did you make the phone call?

The Witness: In the kitchen.

The Court: You have an extension there in the kitchen as well as in the living room?

The Witness: Yes.

Q. (By Mr. Murray): The police took the gun, Mrs. Harrington?

A. After that I didn't notice the gun at all or what happened to it.

Q. And in due course you got it back?

A. Yes.

Q. And then you gave it to Mr. Decker?

A. Yes.

Q. And has it been in your possession since you gave it to Mr. Decker? A. No.

The Court: Well, wait. I don't think that question makes much sense.

(Testimony of Joyce Antonia Harrington.)

Q. (By Mr. Murray): Did Mr. Decker give it back to you?

Mr. Murray: I am sorry, your Honor.

A. No.

The Court: What you mean is, has it been out of your possession since you gave it to Mr. [175] Decker?

Mr. Murray: I guess that would be more accurate, your Honor.

Q. Mrs. Harrington, you have already been paid the face death benefits under these two policies which are involved here, have you not?

A. Yes.

Q. Do you recall when the payment was made?

A. No; I don't; not exactly.

Q. Was it about March 21st of 1960?

The Court: That would be just a year ago today.

A. I don't remember. I really don't.

Q. (By Mr. Murray): Do you remember the amount?

A. The general amount was, I think, \$15,000.

Q. And there was some interest and what have you, so it was slightly in excess of \$15,000?

The Court: Would you answer audibly?

A. Yes.

Q. (By Mr. Murray): And in this case, Mrs. Harrington, you are claiming double indemnity benefits under these same policies? A. Yes.

Mr. Murray: I think that is all I have, your Honor.

The Court: Redirect examination?

Mr. Decker: I have no further questions, your Honor.

The Court: All right. That is all and you [176] are excused.

(Witness excused.)

The Court: Does the plaintiff have any further evidence?

Mr. Decker: Yes, your Honor, there are several items I want to check off here now.

The Court: Will you do so?

Mr. Decker: Counsel, can we read into the record that statement with respect to the cause of death by stipulation?

Mr. Murray: Why, I think so.

Mr. Decker: Your Honor, by stipulation of counsel, may the record show the following with respect to the cause of death of the decedent?

The Court: You mean this is some sort of a statement by an expert, a medical expert who has testified at some other place about the cause of death or has made a statement to the defendant company or something?

Mr. Decker: This, your Honor, is the verdict of the coroner's jury, reading from that verdict.

The Court: You will stipulate that this is the verdict of the coroner's jury and accurately describes the cause of death?

Mr. Murray: No, your Honor, we are stipulating that the information Mr. Decker is going to read are the facts just as he read it into the record in the morning. [177]

The Court: Well, what does that mean?

Mr. Decker: That you can accept this as being a fact, that this is the truth, that what I am about to read is the truth.

The Court: Without regard to its source?

Mr. Decker: Yes.

The Court: All right.

Mr. Decker: The fact, then, will be established as follows: "That the said Arnold Harrington, male, white, married, age 38 years, residence 716 Spruce Street, South San Francisco, California; nativity unknown; occupation, chief lab technician, came to his death on February 5, 1960, at 11:55 p.m. at the St. Luke's Hospital. Cause of death, gunshot wound of brain. Alcohol blood level 0.14 per cent."

The other item that I would like to introduce into evidence, your Honor, is the letter from the New York Life Insurance Co. denying the double indemnity benefit to Mrs. Harrington and presumably containing a statement as to the grounds therefor.

Counsel, do you have an office copy of that letter? We have searched for the original and failed to find it.

Mr. Murray: I will look for it, Mr. Decker. I am afraid that I don't.

The Court: I want to be sure I got that percentage of blood alcohol, or alcohol in the blood. Zero point 14? [178]

Mr. Decker: That's right.

Well, then, without—well, I would like to reserve my right to make this proof, your Honor. Counsel is unable to find his copy of the letter. I am sure we

will be able to come up with one before the day is over.

The Court: What do you want me to do? Just know the date of it?

Mr. Decker: I want more than that. I think I can say to your Honor that in view of the fact that we are asking for interest from the date that this proof was received there is a provision in the Insurance Code which becomes pertinent. It reads as follows——

The Court: Well, all I am interested in—I will let you go into it, but I don't want to take the time now to go into the reasons for it unless it becomes necessary. What I am trying to find out is what fact are you trying to establish. Maybe Mr. Murray will stipulate to it and we can dispose of the matter.

Mr. Murray: I certainly would if I knew what it was.

Mr. Decker: I am trying to establish the fact that upon receipt of the proof of death, which is in evidence, the insurance company denied liability for payment of double indemnity benefits upon the ground that the death was not accidental within the meaning of the policy, and that it did not request Mrs. Harrington to provide more specific proof than [179] she already had with respect to the circumstances surrounding the death.

Mr. Murray: Well, your Honor, I don't know whether this is true and I don't know—that is, I don't see the relevancy of it.

Mr. Decker: Well, it's because you are not

familiar with this code provision. It is highly relevant on this issue.

The Court: Well, what I want is either for Mr. Decker to have a chance to produce the letter and prove it or have a stipulation that that is what the letter says.

Mr. Murray: I would be glad to stipulate if I knew, your Honor.

The Court: Well, I am not at all being critical of you or your company, Mr. Murray, in this regard.

Mr. Decker: I think if the investigator is here I might be able to bring this out from him on examination under 2055. Are you going to put him on?

Mr. Murray: No.

The Court: Well, I don't know that the investigator—of course, 2055 is a lot broader than 43(b). The thing is that I would like to get at this in a way which will cause the least difficulty. As I take it, Mr. Murray, all you want to do is be able to examine the copy or the original and determine its accuracy, and whatever facts are in it, if they [180] are relevant, are admitted?

Mr. Murray: That's right, your Honor. I am relatively sure that a letter was sent denying liability, but I really don't know whether in that letter or elsewhere there was something said about no further proof, or something of that nature.

The Court: Well, I don't know whether it would be said, but that none were asked for, that is what Mr. Decker said. He didn't say that the letter said

that no further proof would be necessary, but he said no further proofs were requested.

Mr. Decker: That's right, your Honor.

The Court: And, of course, you would have to see the letter.

Mr. Murray: I think that I have seen such a letter, your Honor, and I think it may be at my office.

The Court: The point is, it seems to me that the letter itself would be the most satisfactory thing, or a stipulation concerning it. Can we leave the matter so that the letter can be supplied as a part of the record, or a copy of it, and, if not, that then Mr. Decker may have the right to make such other offer of proof that is appropriate to prove by way of secondary evidence what was in it?

Mr. Murray: Of course, your Honor.

The Court: And subject to that right, he can rest his case unless he has other matters he wants to present. [181]

Mr. Decker: I am prepared to rest subject to that understanding. I would like to offer in evidence the diagram.

The Court: Which diagram? The one on the board?

Mr. Decker: The one on the board.

The Court: How are we going to arrange that?

Mr. Decker: Well, I can arrange to have that photographed, if you wish. Actually, I will defer to the Court, in view of the fact that it is a court trial. If your Honor doesn't think it is necessary——

The Court: Frankly, I don't think it is necessary.

Mr. Decker: All right. Then I will withdraw my offer.

The Court: And the officer's diagram is sufficiently comparable for the purposes for which you gentlemen want to use it and I want to use it, to satisfy all the necessary facts. I think there is a difference in the placing of one chair, but I don't care about that.

Mr. Decker: Then I withdraw the offer.

Plaintiff rests, your Honor, subject to that understanding.

The Court: All right.

Mr. Murray: Your Honor, at this time the defendant moves under Rule 42(b) that the Court dismiss the action and enter judgment under that rule, upon the ground that upon the facts and upon the law plaintiff has shown no right to [182] relief.

I think, your Honor, that as a matter of law there is no evidence here, under the authorities, to support a finding that the death of Mr. Harrington resulted from accidental bodily injury within the meaning of the policies. I think, your Honor, that the cases which were cited in our brief are clear upon this point. And I think that under plaintiff's view of the case, the view that Mr. Harrington was injured while he was either fanning or fooling with the safety, with the trigger mechanism of the gun, while it was pointed at his head in a fully loaded condition, I think that under the authorities this

makes out as a matter of law a situation where the insured needlessly, without good cause, and recklessly assumes a risk, a tremendous risk which any prudent man would recognize as highly dangerous.

Now, your Honor, the authorities are set out in full in our trial brief and I am prepared to discuss them at this time, if your Honor cares to.

The Court: Well, I am concerned with the practice which should be followed here. If this motion were made to me in a case to be tried to a jury, I would, under the better practice, withhold ruling or reserve ruling on your motion, present the case to the jury, and then test your motion on a motion for judgment notwithstanding the verdict. I would do this because then if there was a disagreement with my ruling, assuming I were to concur with you, the plaintiff [183] would have the right to test my ruling on an appeal, and if I were wrong and were in error the Court of Appeals could then reinstate that verdict. This, I think, is a better practice.

Now, here I do not have a situation of having another agency or another arm of this court trying the facts. I am the trier of the facts as well as determining the questions of law, so that I presume that I should know the law now, and perhaps could do that if I were sufficiently apprised as to what the law is.

But I think that it would be wise for me to follow somewhat the same practice here and get the evidence before me, whatever you have, even though it means that you are putting on evidence while you

wait for a ruling on your motion. But I think it would be better practice from the standpoint of getting the case disposed of to do that, simply to say to you that I would have to weigh the evidence in the light in which it is now presented by the plaintiff to determine the question raised by your motion.

As I understand, if I were to deny your motion, you would only have a short amount of evidence to introduce anyway.

Mr. Murray: That is right, your Honor.

The Court: Weighing that, I think the better thing for me to do would be to reserve ruling on this motion, you [184] proceed with your evidence, hear it, and then hear the arguments for judgment in this case and then determine your question at that time and dispose of it.

As a practical matter, I don't think there will be very much difference between the question to be decided on this motion and the question to be decided on determining judgment for the plaintiff or judgment for the defendant.

Mr. Murray: I think your Honor is correct in that.

The Court: Because of that, I think I should go ahead and so I will just simply say that I will reserve ruling on that until the time of judgment in the case, or until the time of making a decision in this case on plaintiff's complaint, and if I agree with you I will just award judgment for the defendant and if I disagree with you I will simply award judgment for the plaintiff. So I don't think

there is much difference here in the posture of the case at either point of the case.

All right, your motion to dismiss, then, will be taken under submission and ruling will be reserved until the time for judgment.

Mr. Murray: Thank you, your Honor.

At this time I would like to call Mr. F. Bob Chow.

FRANK ROBERT CHOW

called as a witness for the defendant, being first duly sworn, testified as follows: [185]

The Clerk: Please state your full name to the Court.

The Witness: My name is Frank Robert Chow.

Direct Examination

By Mr. Murray:

Q. Where do you live, Mr. Chow?

A. I live at 1446 Jackson Street.

Q. And what is your business?

A. I am a professional gunsmith and I own a sporting goods store.

Q. And what sort of activities do you carry on at the store?

A. Why, sales and service of all types of fire-arms, principally hand guns.

Q. Do you have shop facilities in the store?

A. I do, sir.

Q. And these are facilities for testing and repairing guns? A. Yes.

Q. How long have you been a gunsmith, Mr. Chow?

(Testimony of Frank Robert Chow.)

A. Oh, in the neighborhood of about thirty years.

Q. Do you have any specialty in your profession?

A. Yes, sir; I specialize in hand guns.

Q. And what do you do in connection with hand guns?

A. Oh, I repair and test and fire and anything pertaining to hand guns, its repair and [186] upkeep.

Q. Have you ever shot hand guns in competition? A. Yes, I have.

Q. Under what circumstances?

A. Oh, I at the present time am shooting for the San Francisco Police Revolver Club and for various other clubs like the Oakland, and so forth.

Q. Have you ever shot in an Olympic team?

A. Yes, sir, I did.

Q. The United States team?

A. Yes, sir.

Q. Have you ever held any world's shooting record?

A. Yes; I have been fortunate enough to hold nineteen.

Q. Nineteen shooting records? A. Yes.

The Court: Is this in the hand gun area?

The Witness: Yes, sir.

The Court: Do you shoot rifles, too?

The Witness: Yes, I do.

The Court: Are you acquainted with my old friend, Johnny Adams?

(Testimony of Frank Robert Chow.)

The Witness: You bet I am.

The Court: He was at Stanford when I was there and he was then the world's rifle champion.

The Witness: Right.

Q. (By Mr. Murray): Mr. Chow, do you belong to any [187] societies having to do with guns?

A. Yes, I do. I am a director of the National Rifle Association at the present time.

Q. Any others?

A. President of the Western Revolver Association, adviser to the San Francisco Police Revolver Club, the Oakland Club, and various other clubs in the area.

Q. Mr. Chow, you have told us that you sell guns at your store. What is the address of your store? A. 3185 Mission Street.

Q. Now, do you sell both new and used guns?

A. Yes, I do.

Q. What, if anything, do you do in connection with the mechanical condition of the guns you sell?

A. Whenever I purchase a gun, the first thing I do is make sure that it is in perfect functioning order and if it is not, why, I repair it before I put it on the shelf to be sold.

Q. You check the mechanical condition of the gun? A. Yes.

Q. Do you check the condition of the hammer of the gun, for example?

A. Oh, yes, everything connected with it is checked.

Q. The safety?

(Testimony of Frank Robert Chow.)

A. Yes, the safety manual and all that is [188] checked.

Q. If you find anything wrong with the gun, do you fix it?

A. That is the first thing I do.

Q. And this is before it goes into inventory?

A. Yes.

Q. Who does this job, Mr. Chow, you or your employees?

A. I do it myself, personally. I have employees, but I handle all the hand guns myself.

Q. So in what condition would you say your guns are when they are placed in inventory?

A. When they are placed in inventory they are in perfect condition, so far as function and service is concerned.

Q. Mr. Chow, did you know Arnold Harrington?

A. Yes, sir, I did.

Q. How long had you known him?

A. Approximately from about 1959 on.

Q. Do you know how long a period that would be?

A. Oh, it would be a period of, counting up to the present time, it would be about nearly three years.

Q. Mr. Harrington died about a year ago, so it would have come——

A. (Interposing): Somewhere in the neighborhood of two years.

Q. About two years?

A. Yes. [189]

(Testimony of Frank Robert Chow.)

Q. What were your relations with Mr. Harrington?

A. He is a customer and client of mine that comes in the store quite frequently.

Q. I understand he worked across the street; is that correct?

A. Very close. St. Luke's Hospital is almost directly across the street from the store.

Q. When would he come in?

A. Oh, he would come in at various times. Usually at noon when he was having his lunch hour, I suppose. I never made much note about the time.

Q. And he came in frequently?

A. He came in fairly frequently, yes.

Mr. Decker: I am sorry, I didn't hear that.

The Court: "Came in fairly frequently."

Q. (By Mr. Murray): Did Mr. Harrington buy any guns from you? A. Yes, sir, he has.

Q. About how many guns did he buy?

A. In checking back on the records, I have found he had purchased five different hand guns from me.

Q. Hand guns? A. Yes.

Q. He didn't buy rifles?

A. No, no rifles. [190]

Q. And these were different types?

A. Various types. I have a list, if you would like to have it.

Q. If the Court is interested in having the gun list——

The Court: I am not.

(Testimony of Frank Robert Chow.)

Q. (By Mr. Murray): Did Mr. Harrington buy ammunition from you?

A. Yes, he has purchased ammunition from me.

Q. For his guns?

A. Yes, for all the different type of guns he purchased, yes.

Q. Was Mr. Harrington familiar with guns?

A. Yes, I would say he is.

Q. Upon what do you base that conclusion?

A. Oh, on the conversations we would have and the way he would handle the weapon.

Q. Did he talk about guns?

A. He would talk about guns, yes.

Q. Did he demonstrate any knowledge about them?

A. Oh, yes, from the way he handled the weapon you could see he knows something about guns.

Q. Was he familiar with the guns he bought from you?

A. Yes, he was plenty familiar with them. I don't know about how familiar he is because I haven't seen him shoot.

Q. Did he discuss with you having fired the guns? [191]

A. Yes, some of the others he has, yes.

Q. And the method of operation?

A. Yes.

Q. Did you sell Mr. Harrington a German Mauser automatic pistol?

A. Yes, sir, I did.

(Testimony of Frank Robert Chow.)

The Court: Will it be stipulated that is the same pistol involved here or do we have to go through it?

Mr. Murray: We don't have to go through that.

Mr. Decker: No, that is stipulated.

The Court: Then the stipulation is that the pistol involved in this incident was purchased by Mr. Harrington from Mr. Chow?

The Witness: I have the serial number.

The Court: Well, you don't have to do that. You don't have to prove it. There is no necessity of doing that.

Q. (By Mr. Murray): Mr. Chow, did you check this gun out? A. Yes, sir, I did.

Q. In what condition was the gun when it was sold to Mr. Harrington?

A. When it was sold to Mr. Harrington it was in perfect operating condition as to safety and to function.

Q. Are you familiar generally with the method of operation of this type of gun?

A. Yes, sir, I am. [192]

Q. Have you ever sold Mausers of this type before? A. Yes, I have.

Q. At the time you sold the gun to Mr. Harrington could it be fired with the safety set on safe?

A. Not set on safe, no.

Q. How do you know that?

A. Because I checked it and tried it myself numerous times.

Q. Before you sold it? A. Yes.

Q. Mr. Chow, based upon your experience with

(Testimony of Frank Robert Chow.)

guns, would it be prudent under any circumstances for a man familiar with guns to point such a gun, loaded, at his head and pull the trigger?

A. Let's state it this way: I wouldn't do it myself.

The Court: I think I will have to strike that answer in the way it is put. I know what he means. I think what he means is that it would not be a safe practice. But, Mr. Chow, the question put to you as an expert in firearms is not what you, yourself, would do, but what any person who was dealing with firearms generally, would it be a safe practice to point a firearm at your head?

The Witness: No, it's not a safe practice to point a firearm at your own self or at anyone.

The Court: This is an unsafe practice in and of [193] itself regardless of the condition in which the gun is?

The Witness: Yes, sir.

The Court: That's your opinion as an expert?

The Witness: That is my own opinion.

Q. (By Mr. Murray): And what if he thought the safety was on?

A. I wouldn't trust safeties and I wouldn't trust anything about firearms.

Q. When it comes to pointing it at your head?

A. Yes, sir.

Mr. Murray: That is all I have, Mr. Chow.

The Court: You may cross-examine.

Mr. Decker: Thank you, your Honor.

The Court: Well, just a moment. I think we

(Testimony of Frank Robert Chow.)

had better take our afternoon recess and then you can cross-examine Mr. Chow. Mr. Chow, if you will be available after recess for cross-examination, we will go forward.

The Witness: I will, sir.

(Short recess.)

The Court: You may proceed.

Cross-Examination

By Mr. Decker:

Q. Mr. Chow, as I understand your testimony, when you sold this gun to Mr. Harrington it had no mechanical defects of any kind? [194]

A. That is right.

Q. By the way, do you know the date of that sale?

A. Yes, I have it here, if I may refer to my notes.

The Court: Why, certainly.

A. The last sale was 1/14/60. That is January 14th, 1960.

Q. (By Mr. Decker): Do you know of your own knowledge that that is the sale of the hand gun that is in evidence here?

A. Yes. I took this notation from my firearm registry, which is mandatory for all bona fide dealers to keep.

Q. All right. Now, Mr. Chow, you indicated that Mr. Harrington had discussed with you the operation of some of his guns?

A. Yes, sir.

(Testimony of Frank Robert Chow.)

Q. Had he ever done that with relation to this gun?

A. Yes, he wanted to know how to load it, and he wanted to know how to operate the safety on it and what sort of safety it did have on it, and I explained it to him.

Q. This was before he purchased it?

A. Well, maybe before and even afterwards, because I make sure all my clients are well checked out before the gun is delivered.

Q. Do you have any recollection of his coming back to your shop after he purchased the gun and discussing with you [195] the operation of the gun?

A. No, sir, I did not see the weapon again.

Q. You didn't see the weapon again after it left your shop? A. No, sir.

Q. And you have no recollection of him coming in without the weapon and discussing the operation of it after you sold it to him?

A. I have no recollection at all.

Q. Mr. Chow, you have indicated that in the condition the gun was at the time you sold it to Mr. Harrington, it would be impossible for the gun to fire with the safety mechanism on safe?

A. That is right.

Q. I suppose, then, sir, that it is not unusual in your experience for owners of guns of this type to rely completely upon that safety mechanism; isn't that true?

A. That is true. A lot of people rely on the safety mechanism.

(Testimony of Frank Robert Chow.)

Q. And can you tell us whether or not from your conversations with Mr. Harrington and your knowledge of him that he placed complete reliance upon the safety mechanism on this gun?

A. I could not tell you that, sir, because I do not know Mr. Harrington's feelings regarding to [196] safety.

Q. I see. Are there various——

The Court: I just want to be sure, you say, "Regarding to safeties." You mean "t-o"—not "t-w-o"?

The Witness: Not "t-w-o," no. To safeties.

Mr. Decker: Well, I am not sure——

The Court: "In reference to" is what he means.

Q. (By Mr. Decker): And particularly, this particular gun, you don't know what his attitude was toward it? A. No.

Q. All right. Mr. Chow, with respect to various types of firearms, some safety mechanisms are considered more safe than others, isn't that so?

A. That is right.

Q. And with respect to this particular gun, would the safety mechanism on this gun be considered one of the more safe types?

A. Yes, sir. This weapon is constructed so that when the safety is on, the hammer is actually locked, and on most weapons the cylinder is locked, so this one here is really a very safe safety.

The Court: What do you mean by the hammer is locked?

The Witness: You take any double-barreled

(Testimony of Frank Robert Chow.)

shotgun, a lot of people think the hammer is being held when you put the safety on, but it is actually not. The only thing holding is your trigger is held so you can't pull the trigger, but [197] your hammer is still able to slip off the cylinder. But this one here, when you have the safety on your hammer is cammed and locked into a locking place and it can't——

The Court: Well, what you mean by that is not that the hammer won't—the spring won't release the hammer, but if it is released there is a cam in between the hammer and the firing pin so that there can be no accident while the safety is on, of the hammer slipping and going forward and hitting the firing pin?

The Witness: That is right, sir.

Q. (By Mr. Decker): So is there a particular descriptive phrase or term in the gun business which describes this type of a safety mechanism—"positive action"—or something of that sort?

A. Well, if you are going to describe it as any action, it would be a safety that actually locks the hammer.

Q. Actually locks the hammer? A. Yes.

Q. And this is considered a more safe type safety than the type that does not actually lock the hammer, is that right? A. That is right.

Q. Did Mr. Harrington know this?

A. I have explained to him, yes, about this.

Q. Mr. Chow, the evidence in this case indicates that [198] following the incident which we are con-

(Testimony of Frank Robert Chow.)

cerned with here, the gun was found lying on the floor in the cocked position and with nine rounds of live ammunition in it and one empty cartridge was found, having been ejected, apparently, from the gun. It was found in the room.

With your knowledge of this particular gun, would it be your opinion that the gun had been fully loaded immediately prior to discharge and that one round had been discharged?

A. Without checking—like all gunsmiths, we work on various types of weapons, and without actually checking with rounds, I am not quite sure whether that held ten rounds in the magazine or whether it held nine rounds in the magazine and one in the chamber. Now, that I couldn't tell you without testing it, right at the moment.

Q. Would that affect your answer? You see, what I am getting at is this: This is the kind of a gun, is it not, that automatically recocks itself following discharge?

A. Yes. It is what they call a semi-automatic.

Q. A semi-automatic hand gun?

A. Yes. You fire and the recoil actuates the action and throws another round in.

Q. And then upon the magazine being emptied and the last live round fired, the gun will leave itself with the slide back?

A. Yes. It stays open because the powder from the [199] magazine has now come up in line where the cartridge is supposed to be and proceeds to lock back.

(Testimony of Frank Robert Chow.)

The Court: This is a little argumentative, but while I have an expert here I would like to have you tell me, what is the significance of what you have been asking?

Mr. Decker: The last few questions?

The Court: Yes.

Mr. Decker: Merely corroborative of the expert who was called for the plaintiff, your Honor.

The Court: Still, what is the significance of it in terms of fact? I may want to ask this man some questions about the significance of this.

Mr. Decker: I think I must confess to you, sir, that it has no significance, really. I have nothing in the back of my mind except to try to bring out all of the characteristics of this hand gun insofar as I am able to do so.

The Court: All right. I can't think of any. If you had something, I wanted to know about it so I can ask this man about it because I consider him a very qualified expert.

Mr. Decker: You recall, your Honor, that when the officer testified he said when he found the gun it was in the cocked position?

The Court: Yes. It's obvious the gun had been fired and recocked and reloaded itself, ready to shoot again and the safety was off. [200]

Mr. Decker: I think it may be more obvious to you, your Honor, than it is to me because I think you know a little bit more about guns than I do.

The Court: I don't want to superimpose what I know. I know just enough to be dangerous, is all,

(Testimony of Frank Robert Chow.)

and if there is a real problem of expert knowledge here I want this man's expert opinion.

Q. (By Mr. Decker): All right, let's leave that subject for a moment. You spoke, sir, of the danger or the violation of the safety rule involved in pointing a loaded gun at one's head.

The Court: An unloaded one.

Mr. Decker: I was going to ask that as being the next question.

Q. You would also have answered the same had the gun been an unloaded gun?

A. Yes, I would.

Q. And these are just two of the cardinal principles that all people who handle guns follow in connection with good safety practice?

A. That is right, sir.

Q. Another such rule would be that of never trying to go through a barbed wire fence carrying a shotgun?

A. That is right.

Q. And I dare say you could recite a whole list of such [201] safety practices, could you not?

A. That is right.

Q. It is nonetheless true, of course, is it not, sir, that even people who are accustomed to handling firing guns oftentimes do not follow these safety rules that we have referred to?

A. You are correct, in many instances.

Q. And this often results in tragedy, doesn't it?

A. Yes, sir.

Q. I want to ask you this, Mr. Chow, and I think this will conclude my examination:

(Testimony of Frank Robert Chow.)

With the gun in the condition it is now, you have already testified that it will not fire. It will not discharge. If the hammer is released by the trigger it will not fire, isn't that right, because it is on safe?

A. If it is on safe, yes.

Q. I am sorry, you can see the safety lever is in the safe position? A. Yes.

Q. And the same is true if the hammer is released by moving the safety forward?

A. That's right.

Q. It won't fire? A. No, sir.

Q. And the same would be true if one in the process of [202] attempting to cock the gun should inadvertently release it, it wouldn't fire if the safety mechanism were on?

A. If the safety is on it will not fire, that's right.

Q. So it would be your testimony, or your opinion, wouldn't it, sir, that if the gun did fire, then the safety mechanism would have had to be off the safe position? A. That is right.

The Court: It would have had to be what we call "on"? It would have to be in the firing position?

The Witness: Yes, in the firing position, not "on" or "off."

Q. (By Mr. Decker): Is there any point between the full safe position and the full fire position that the gun will fire?

A. If the piece is worn and the lever is part way back, under certain circumstances, it could cam

(Testimony of Frank Robert Chow.)

through with sufficient force to ignite the cartridge, but usually you have to release it completely before it will fire.

Q. So then it would be your testimony, sir, that the gun is much more dangerous in that condition than it would be in the full safe position?

A. Yes, it would be.

Mr. Murray: In the fire position, Mr. Decker?

Mr. Decker: No, in a position close to the fire position but not all the way to it. [203]

Q. Now, another thing I wanted to bring out, sir, is that there is some sort of a mechanism for locking this safety lever into place in the safe position and in the fire position, isn't that so?

The Court: You mean on this gun?

Mr. Decker: Yes.

The Witness: On any weapon there is a little——

The Reporter: I am sorry, I can't hear you.

The Court: Will you repeat that?

The Witness: The safety mechanism has a tendency to cam over into a kind of—kind of like a little recess there, like. In other words, like a recess where it cams into. It's a little bit harder when it's on. You can feel it's a little bit harder. Actually, what you will do, you cam in the hammer which makes it a little heavier.

Q. (By Mr. Decker): Yes. What I am getting at is this: It is much easier to move this safety mechanism between the full safe position——

A. Yes, it is.

Q. ——and the full fire position?

(Testimony of Frank Robert Chow.)

A. Right.

Q. Than it is to move it from either of those positions? A. Right.

Mr. Decker: Do you follow me, your Honor?

The Court: Yes, I follow you exactly. It's like a [204] cocked switch on a railroad?

The Witness: That's right. It can swing either way.

Q. (By Mr. Decker): Mr. Chow, assuming that this particular gun had been fully loaded and the handler of it had been producing this noise without discharging it (demonstrating), this noise, without discharging it, then it would be your opinion that the safety mechanism was on full safe?

A. Then it would have to be on full safe. Otherwise it would discharge.

Q. Right. Now, in your experience with the gun, what kind of an explanation could you give which would account for the gun being placed in the firing position, or, at least, in a position close enough to it so that it would fire, without the actor intending to do that? Do you understand my question?

A. Yes, I do. It's like anything else, a safety can be pushed off because you want to push it off, manually, and it could be—under certain circumstances, it could be brushed off. There could be a lot of things could happen. That is, an accident is an accident.

Q. You are referring now to the factor of human error involved?

A. That's right, human error.

(Testimony of Frank Robert Chow.)

The Court: What you are saying is that it could unintentionally be moved from a safe position to a firing position? [205]

The Witness: That's the only way the weapon would fire, is to move it, so if you move it, it has to be moved either intentionally or unintentionally, or accidentally, or whatever it is.

Q. (By Mr. Decker): Could you illustrate how this might have been done unintentionally?

A. Well, as you know, once you have taken it off the safe it moves rather smoothly, so that could be done in many ways. It could be caught in your clothes, a sleeve; it could be caught on—it could be caught on (inaudible). He could be cleaning it. There's lots of things that could cause it. That comes in the realm of "one of those things."

Q. You wouldn't consider this to be an impossible thing to happen, would you, sir?

A. Nothing is impossible, sir.

Q. I notice, among other things, that in cocking this gun, one has to pull the hammer back to this position.

The Court: Would you do this where Mr. Murray can see you?

Mr. Decker: I am not intentionally hiding it, your Honor.

The Court: I know that.

Q. (By Mr. Decker): I notice that in order to place a gun into a firing position, if there has been no prior discharge of the gun to automatically put it in that position, [206] one has to pull the hammer back in this fashion, isn't that so?

(Testimony of Frank Robert Chow.)

A. Yes, if it has not been cocked previously, yes.

Q. In your opinion, would it be a reasonable possibility—a reasonable possibility—that in doing that, the handler of the gun might inadvertently pull the safety mechanism back to the firing position?

A. It is possible.

Mr. Decker: I think that is all. Thank you, Mr. Chow.

The Court: Redirect examination?

Mr. Murray: Thank you, your Honor.

The Court: If you want to take a moment to review your notes, you may do so.

Mr. Murray: Thank you, your Honor.

Redirect Examination

By Mr. Murray:

Q. Mr. Chow, in response to Mr. Decker's questions, I believe you testified that you have known or heard of individuals familiar with guns who didn't follow the safety rules and who sometimes relied upon the safety mechanism?

A. Yes.

Q. Mr. Chow, would knowing this change your opinion as to whether or not it would be prudent for a man to point this gun, fully loaded, to his head?

A. Yes, I would say it's prudent. [207]

Q. It's prudent?

A. I think it's a foolish thing to do, to point it at your head.

Q. It is a dangerous thing to do?

A. Yes, that is right.

(Testimony of Frank Robert Chow.)

Q. And the fact that some people do it doesn't make it safe?

A. It doesn't make it safe at all, no, just because somebody relies on the safety.

Q. Now, Mr. Decker discussed with you, I believe, the question of the moving of the safety lever from the safe position to the fire position, and with particular reference to the time just before it snaps into the firing position, and in response to his question I believe you said that if the safety mechanism is worn, the cam is worn, conceivably the gun could fire, even though it is not on the full firing position?

A. That is right.

Q. With reference to this gun, Mr. Chow, do you have any information which would——

The Court: Would you speak a little more loudly, please?

Q. (By Mr. Murray): With reference to this gun, do you have any information which would lead you to believe the cam was worn? [208]

A. I haven't examined the weapon ever since it left the shop so I do not know what condition it is in, but I could give you a simple test.

Q. Was it worn when it was sold to Mr. Harrington? A. No, it was not.

Q. If you would like to test it, all right.

A. At the present time it will not fire even if it is slightly off of the safe position.

Q. It will not fire? A. No.

Q. Now, I think we were discussing a moment ago, or you were discussing with Mr. Decker, the

(Testimony of Frank Robert Chow.)

noise which the gun might make with the hammer cocked in this fashion. There are several ways, as I understand it, to make this noise. You can cam the hammer back as I am doing now?

A. Yes.

Q. Or you can pull it back with the safety on, or pull it back with the safety on and pull the trigger?

A. Yes.

Q. Now, you have testified in response to questions by Mr. Decker that in any of these methods the safety, I think, ends up on safe and the gun will not fire. Now, Mr. Chow, under this assumption, would it be a prudent thing for a man with a loaded gun to point it to his head and then monkey around with the hammer in this fashion? [209]

A. I would think it would be very foolish to do it.

Q. And dangerous? A. And dangerous.

Mr. Murray: That is all I have, your Honor.

The Court: Any recross-examination, Mr. Decker?

Mr. Decker: You wouldn't consider it, though, inconceivable that somebody familiar with a gun and relying on the safety mechanism could do that, would you, sir?

The Witness: It has been done.

Mr. Decker: Thank you, very much, Mr. Chow.

The Court: All right, Mr. Chow, that is all. Thank you.

(Witness excused.)

The Court: Are there any further witnesses on behalf of the defendant?

Mr. Murray: Yes, your Honor, I have one witness, Mr. Lowell Bradford, who is a gun expert and has examined the gun on our behalf. I realize we have covered some of this material.

The Court: Is there anything special that you want from him?

Mr. Murray: There are a few additional questions I would like to ask Mr. Bradford.

The Court: Is he here?

Mr. Murray: Yes, your Honor. [210]

The Court: All right, you may call him as your witness.

LOWELL W. BRADFORD

called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court?

The Witness: Lowell W. Bradford. L-o-w-e-l-l. The last name is B-r-a-d-f-o-r-d.

Direct Examination

By Mr. Murray:

Q. Where do you live, Mr. Bradford?

A. In the City of Campbell, California, at 31 North Carlyn Avenue.

Q. And what is your work, sir?

A. I am a criminologist, sometimes called an examiner of physical evidence, or a consultant in criminalistics.

(Testimony of Lowell W. Bradford.)

Q. Do you have any official connection with a unit of the government? A. Yes.

Q. And what is that?

A. I am the director of the laboratory of criminalistics in Santa Clara County, which is a part of the department of District Attorney in that county.

Q. What are your duties as director of that laboratory? [211]

A. My duties are the examination of various kinds of physical evidence submitted by the various enforcement agencies and the administration of the laboratory in respect to this work.

Q. Do you have assistants in your work?

A. Yes.

Q. How many are there?

A. A total staff of about seven.

Q. And you have, I take it, laboratory facilities for use in your work? A. Yes.

Q. I wonder if very briefly, Mr. Bradford, you would give us your educational and professional background with particular reference to firearms and ballistics?

A. My education in college consists of six years in all, all taken at the University of California in Berkeley. My background in connection with firearms included some training in ballistics at the University as an undergraduate student in the ordnance R.O.T.C. program. Later, during the war, I served approximately five years in the Ordnance Department connected with firearms and ammunition technical problems.

(Testimony of Lowell W. Bradford.)

Since that time, for about 13 or perhaps a few more years, I have been involved in the examination of evidence. I have had occasion to examine many different types of firearms concerning the various functioning and manipulative problems. [212]

Q. Have you ever been employed professionally by the State of California? A. Yes.

Q. What were your duties?

A. I was State Criminologist while employed by the State, in the Department of Justice.

Q. And when was this, sir?

A. It was in 1947.

The Court: Is that a part of the Bureau of Criminal Identification?

The Witness: Yes.

The Court: Identification and Investigation?

The Witness: C. I. and I.

Q. (By Mr. Murray): And when did you establish the laboratory in San Jose?

A. This was established in the forepart of 1948.

Q. And you have been its director since?

A. Yes.

Q. And have you taught courses on the handling of small arms and upon ballistics and forensic evidence and things of that nature? A. Yes.

Q. And where was this?

A. Part of this work was done at the City College of San Francisco in about 1952 and 1953 as part of a course in [213] scientific evidence presented to police officers. For about 12 years I have been an associate or assistant professor of police

(Testimony of Lowell W. Bradford.)

at the State College in San Jose, and part of the teaching there was devoted to firearms, technical information. I also taught a course in hunter safety to prospective instructors in that subject in the city school program in San Jose.

Q. What sort of safety?

A. Hunter safety.

Q. Do you belong to any professional societies or associations having to do with firearms or ballistics?

A. Yes.

Q. And what are they?

A. I am a life member of the National Rifle Association, and on the technical side, a member of the California Association of Criminalists, and the American Academy of Forensic Sciences, which deals in legal scientific problems.

Q. Are you yourself familiar with the firing of rifles and small arms?

A. Yes.

Q. Now, Mr. Bradford, did I ask you to examine a gun to determine its method of operation?

A. Yes.

Q. And did you receive such a gun?

A. I did. [214]

The Court: Well, let's not waste time on this. This is the gun involved in this case. Is there any argument about it?

Mr. Murray: No, none whatever, your Honor.

The Court: All right, let's proceed.

Q. (By Mr. Murray): You did examine a gun?

A. Yes.

Mr. Murray: May it be stipulated, Mr. Decker,

(Testimony of Lowell W. Bradford.)

that I received a gun from you prior to delivering it to Mr. Bradford?

Mr. Decker: Surely.

Q. (By Mr. Murray): I wonder if you would just look at the gun there, Mr. Bradford? You can satisfy yourself it is unloaded, if you like.

Is this a German Mauser? A. Yes.

Q. Are you familiar with a Mauser of this type?

A. Generally.

Q. Have you examined such guns previously?

A. Yes.

Q. Now, what did you do with this gun in connection with your examination?

A. My examination consisted of manipulating the firearm to ascertain whether or not it was in a normal functioning position or condition. I tested the trigger pull by weight [215] required to fire it. I also applied tension tests to the safety mechanism to determine how much pull is required to put the weapon off the safety position. I also determined various ways in which the safety hammer combination operated, and I finally—I tried these tests on the safety mechanism to ascertain whether or not it was working in the final stage by using a cartridge case in the chamber which had the powder and bullet removed but with a primer in the case, to ascertain whether or not it could be fired.

Q. And did you fire the gun?

A. No, only the primer was the only thing I fired.

Q. Did you disassemble the gun?

(Testimony of Lowell W. Bradford.)

A. I did not.

Q. In what condition did you find the gun, Mr. Bradford?

A. I found the weapon in what I would call normal functioning condition.

Q. How did you find the action of the trigger?

A. The action of the trigger was normal.

Q. And of the hammer?

A. The hammer, normal.

Q. And of the safety? A. Normal.

Q. Mr. Bradford, I wonder if you would please take the gun once again and demonstrate briefly to us the manner in which the gun is loaded? [216]

A. The weapon may be loaded by one of two methods. When the bolt is retracted in the position I now have it, in looking in from the top of the breach mechanism, one can see the follower of the magazine.

The rounds can be inserted by simply placing them in there and with the thumb, pushing them down. There is also made for this weapon a clip which fits in a notch in the top of this weapon. I have such a clip with me. It will contain as many as ten rounds but will function with less. Without inserting any empty cartridges which I now have in the clip, these are placed as I have equipped now in the top of the mechanism and then, with the thumb, the rounds can be simply pressed, at which time they will be transferred from the clip into the magazine, and then the clip may be released and

(Testimony of Lowell W. Bradford.)

the bolt will go forward and will load the top round in the chamber.

If the rounds are loaded separately by hand, one can either leave a round in the chamber or push it down in the magazine, whichever the case may be.

The Court: As long as you leave room enough for the breech to close without shoving a shell into the barrel?

The Witness: Yes, your Honor, that's right.

Q. (By Mr. Murray): How many rounds will this one hold if fully loaded?

A. I think it holds ten in the magazine. I wouldn't be [217] sure of that unless I put ten in it, but I believe it holds ten in the magazine.

Q. When you say "the magazine," do you include also the chamber?

A. When I say "magazine," I do not include the chamber.

Q. In what position would the gun normally be immediately after it has been loaded, Mr. Bradford?

A. The normal procedure on loading is for the breech bolt to move forward and be in the closed position with the hammer in the cocked position and the safety in the fire position.

Q. And how would the cartridges be unloaded, assuming the gun were not to be fired?

A. If one desires to unload the cartridges from the magazine or the chamber in this particular weapon it is necessary to grasp the weapon in one hand or the other, either by the grip or the forepart

(Testimony of Lowell W. Bradford.)

of the magazine, and then retract the bolts successively by simply pulling it, which makes it go through its cycle of extraction and ejection and the cartridge cases are ejected out, one by one.

The Court: In effect, you are pumping the shells out?

The Witness: Yes, sir. And at the time of pulling out the last round the breech mechanism stays open as I have it now.

Mr. Murray: Mr. Bradford, did you take any photographs of the gun in its normal operating position? [218] A. I did.

Q. Do you have those photographs with you?

A. I do.

Q. Would you produce them, please?

A. Yes, sir.

The Court: Is there any objection to them going into evidence?

Mr. Decker: No, your Honor.

The Court: Put them in evidence.

Mr. Murray: In the order in which they are marked now.

(Photographs referred to were received in evidence as Defendant's Exhibits C-1, -2 and -3.) [219]

Q. (By Mr. Murray): These are photos of this particular gun, are they, Mr. Bradford?

A. Yes, they are.

Q. Let me give you back the photographs, Mr.

(Testimony of Lowell W. Bradford.)

Bradford. Using these photographs, Mr. Bradford, and the gun, if you choose, would you please show us in detail the method of operation of the gun?

A. At what point did you want me to start, please?

Q. Why don't you start with photograph 1?

The Court: C-1.

Q. (By Mr. Murray): Photograph C-1 in evidence.

A. C-1 represents the position of the gun when the safety is in the fire position, the "F" showing, the hammer fully retracted. In this position the gun can be fired by pulling the trigger. The position—Photograph C-2 is a photograph showing the hammer in the same cocked position, but with the safety lowered into the safe position, yet the safety has not been lowered sufficiently far to cause the hammer to drop. And the third possible arrangement is to have dropped the hammer as in picture C-3, the safety likewise in a full forward position. This photograph shows that.

The Court: When you say "full forward," you mean in the safe position?

The Witness: Full forward safe position, yes, sir.

The Court: Yes. [220]

A. (Continuing): This photograph shows the space between the hammer and the area of the firing pin, which is the principal basis of the safety arrangement in this position.

Q. (By Mr. Murray): Mr. Bradford, did you

(Testimony of Lowell W. Bradford.)

test the trigger pull on this gun? A. Yes.

Q. And what did you find?

A. Trigger pull had a variation. I was able to pull the trigger so that it would drop the hammer with a pull as small as two pounds fourteen ounces, and was always able to pull it with a pull as high as three pounds four ounces. So the range then varies between these two limits.

Q. This is——

The Court: Three pounds how many ounces?

The Witness: Three pounds four ounces.

The Court: Thank you.

Q. (By Mr. Murray): This is a normal action on a gun of this sort?

A. In my experience, this is normal for this type of weapon.

Q. I wonder if you would put that slide back in again, Mr. Bradford. I am not sure I know how.

Mr. Bradford, starting the hammer back and the safety in the fire position, you have demonstrated that you can push the safety up to this position, which is where it clicks, and [221] showing safe, let the record show, and pull it, and then the hammer will come to a position about what, about a sixteenth of an inch from the firing pin?

A. Well, it leaves a space. It is something on that order of size.

Q. Well, now, will the gun fire when the hammer does this?

A. This will not discharge a round which is in the chamber.

(Testimony of Lowell W. Bradford.)

Q. How do you know that?

A. By testing it with a cartridge case in there with the primer intact.

Q. Now, similarly, Mr. Bradford, if the hammer is pulled back, the safety is moved from fire all the way to safe, and the hammer will drop again?

A. Correct.

Q. Will this fire the gun?

A. This will not fire the gun.

Q. And you tested this in the same fashion?

A. Similarly, yes.

Q. Now, I think you have told us, Mr. Bradford, that immediately after loading, the gun would be in a position with the hammer fully back and the safety on fire?

A. Yes. I have the bolt retracted now.

Q. Yes. A. Want me to drop that? [222]

Q. If you will, please. Now we can move the safety forward, put the gun on safe, is that right?

A. Yes.

Q. Fire at safe. Now, what must be done to move the safety into firing position?

A. In order to put the safety in the firing position, it's necessary to retract the safety back to a point where it is opposite the hammer, and see if it shows on the indicator of the safety mechanism.

Q. You are indicating the safety in the full fire position? A. Yes.

Q. Does this take a substantial pull, Mr. Bradford? A. Yes, it does.

(Testimony of Lowell W. Bradford.)

Q. Did you determine how much of a pull it took? A. I did.

Q. And would you tell us, please?

A. This required a minimum of 26 ounces and sometimes as much as 60 ounces. In terms of pounds——

The Court: 22 ounces to 60 ounces?

The Witness: 22 to 60.

Q. (By Mr. Murray): And in terms of pounds?

A. In terms of pounds, at 16 ounces a pound, this would be as little as one pound ten ounces and as much as three pounds twelve ounces.

Q. Is this a normal action for a gun of this sort? [223] A. Yes.

Q. Mr. Bradford, could the safety be moved from the safe to the fire position by pulling the trigger of the gun?

The Court: You mean by cocking the gun? Oh. By pulling the trigger. I see what you mean.

Mr. Murray: Yes, your Honor.

The Witness: May I have that question again?

Q. (By Mr. Murray): Assume that the safety is on safe. Can the safety be moved from the safe to the fire, and the hammer back—can the safety be—we can't do that, can we? Can it be moved from safe to fire position by pulling the trigger?

The Court: Talking about the safety?

Q. (By Mr. Murray): The safety.

A. No. No, it can't.

Q. Why is that?

A. That's because of the way the gun is designed.

(Testimony of Lowell W. Bradford.)

The Court: Well, the trigger has nothing to do with the safety; isn't that the point?

The Witness: Well——

The Court: I mean with operating the safety mechanism.

The Witness: I'm not sure I have the question straight, I guess.

Q. (By Mr. Murray): Well, by pulling the trigger, Mr. Bradford, is it possible to move the safety from safe to fire? [224]

A. No, it isn't.

The Court: Well, unless you deliberately move it with some other part of the hand other than the trigger finger.

Mr. Murray: That's right, your Honor.

The Court: That's what you mean, isn't it? In other words, just by pulling the trigger, the safety mechanism will not go from an on safe position to a fire position?

Mr. Murray: That's right, your Honor.

The Court: And in that respect the trigger isn't even connected with the safety mechanism, is it?

The Witness: No, sir.

The Court: As I understand it, this safety mechanism interposes something between the hammer of the gun and the firing pin?

The Witness: That's correct.

Q. (By Mr. Murray): Mr. Bradford, I show you a photograph entitled "Defendant's Exhibit B-6," which is in evidence, and I ask you if you have ever seen that photograph before or a similar

(Testimony of Lowell W. Bradford.)

photograph? A. Yes, I have.

Q. Have you looked at the photograph with a view to determining the position of the mechanism of the gun shown there? A. I have.

Q. Now, Mr. Bradford, assuming that this photograph shows the gun which is on the table there before you, are you able [225] to determine the position of the hammer?

A. I have an opinion concerning it, yes.

Q. What is your opinion?

A. It's my opinion that this photograph shows the relative position of the safety and hammer as I have them pictured in Photograph No. C-1. In other words, the full fire position of both hammer and safety.

Q. The hammer is fully back and the safety is on fire? A. Yes.

The Court: Well, this would be the normal position for this gun if a shot had just been fired from it?

The Witness: Precisely.

Q. (By Mr. Murray): Now, Mr. Bradford, you heard some testimony in here today about—I wonder if you could put the slide in again, please? You heard some testimony here today about making a hammer click in various sorts of fashions, either by fanning the hammer with one's thumb, or with the safety on fire, pushing it forward until the hammer comes home to this position, or with the safety on safe and pulling the trigger.

Now, in any of these circumstances, you have

(Testimony of Lowell W. Bradford.)

testified, I believe, that the gun would not discharge? A. That's correct.

Q. Is that correct? Because the safety always ends up on safe? [226] A. Yes, sir.

Q. Assuming, Mr. Bradford, that one were made—let's take these one by one. Now, assuming that one were doing the first of these acts, which would be, say, with the safety on safe and the hammer back, pulling the trigger; what would be necessary to do that repeatedly, make that same noise in the same fashion?

A. Well, one would have to retract the hammer and pull the trigger, the two operations involved.

Q. And you were just indicating the manner in which that could be done?

A. Yes. And I have just demonstrated the sequence.

Q. Could it be done with one hand, Mr. Bradford?

A. Well, I can do it. It's a little awkward, but it's possible. It is a rather strong spring on the hammer.

Q. Now, Mr. Bradford, in the next operation, which is with the hammer back and the safety on fire, by pushing the safety forward to the safe position, the hammer drops. What would have to be done to do that again in this fashion?

A. It would be necessary to retract the safety first, because the hammer will not stay in a cocked position unless the safety is retracted.

Q. Moving the safety to fire?

(Testimony of Lowell W. Bradford.)

A. Yes. In other words, it would be the operation first of moving the safety back, second of cocking the hammer, and, [227] third, of pushing again forward on the safety mechanism.

Q. Mr. Bradford, the last device we talked about, I believe, was moving the hammer back and letting it come forward. Now, what would have to be done to do that?

A. In this, starting out from what would be my position, now, C-3 in the photograph, one would have to thumb the hammer either with the right hand or with the left hand, and would either have to maintain the safety in a full forward position, in which case the hammer will not stay cocked, or would have to cock it less than the full position, at which time it would drop under spring action. When the hammer is pulled in this position more than once, the safety is pulled back to a position where it will maintain a cocked position on the second try.

Q. Now, Mr. Bradford, in this first experiment we have performed here, which is with the safety on safe, pulling the trigger, you have said that the gun would not discharge in this way?

A. Yes.

Q. Is that right? A. That's right.

Q. Would it be a prudent thing to do, Mr. Bradford, in your experience, for a man experienced with guns to load the gun, point it to his head, and attempt this experiment?

A. I would consider it to be very imprudent.

Q. Would it be a dangerous thing to do?

(Testimony of Lowell W. Bradford.)

A. In my opinion it is, yes. [228]

Q. What about experiment No. 2 with the gun, with the firing mechanism on fire, the hammer back, pushing the safety forward until the hammer clicks? Do you think that would be a prudent thing to do?

A. You mean pointed at someone?

Q. For a man experienced with guns to load the gun, point it at his head and perform this experiment?

A. No, I think it would be very dangerous and imprudent.

Q. And how about situation 3, with the hammer?

A. Same thing.

Q. Mr. Bradford, based upon your experience with guns and upon your expert knowledge of weapons, would it be prudent under any circumstances for a man familiar with the operation of guns to point this gun in a loaded condition at his head and either pull the trigger or perform any one of these experiments we have just talked about?

A. No, I think it would be very imprudent to point a loaded weapon any time at oneself or at another person.

Q. What if the man thought the safety was on?

A. It wouldn't make any difference.

Q. It would still be a dangerous thing to do?

A. The concept of safety of firearms is not to point them unless you expect to shoot.

Mr. Murray: That's all I have from Mr. Bradford, your Honor. [229]

The Court: Cross-examination.

(Testimony of Lowell W. Bradford.)

Cross-Examination

By Mr. Decker:

Q. Mr. Bradford, to point that gun at another individual or at oneself, whether it is on safe or not on safe, or whether it is loaded or unloaded, is not good practice, is it?

A. That's correct.

Q. Violates one of the cardinal rules of safety in the handling of firearms?

A. Indeed it does.

Q. Now, Mr. Bradford, I notice that when you pulled the safety mechanism back—would you mind releasing the slide? When you pulled the safety mechanism back, you did it with your left hand?

A. Yes, sir.

Q. That, I take it, is the proper way to maneuver the safety mechanism, with the left hand?

A. Well, as to what's proper, I think it is a matter of habit or strength or ability. The safety can actually be manipulated with either right or left hand with equal facility by me.

Q. Supposing that you have the gun in a firing position and you wish to put it on safe. Now, it was in that position, I noted, when you, in putting it on safe, used your left hand. That would be the way you would do it, would it not? [230]

A. Well, I hadn't given it any thought. I think it's a little easier for me to do it that way, yes.

Q. Isn't it also a fact, sir, that—well, let's put the gun in a position with the hammer down, that

(Testimony of Lowell W. Bradford.)

is, fire the gun. That's right. Now, if you wish to cock the gun and then put it on safe, what would be the way you would do it?

A. My normal way would be to use the left hand to cock the hammer, because the hammer does have a very stiff pull back to it. And then I would put the safety on with the same thumb, because it's there at the end of the hammer retraction.

The Court: Isn't it already on safe when the hammer is retracted?

The Witness: No, the way that I did it, that particular time, I retracted the hammer with the safety in the fire position.

The Court: I understand that, but if the safety is in safe position and you retract the hammer, in other words, you cock the gun, without moving the safety lever, or the safety mechanism, it still stays in a safe position?

The Witness: Yes, sir; that's correct.

Q. (By Mr. Decker): All right. Now, do you consider that a safer way of handling the gun than to use your right thumb for the purpose of maneuvering the safety lever?

A. Oh, I don't think there's any particular difference as far as the safety part of it is concerned, except that I have a [231] firmer grip on my right hand if I use the left, and if I use the right hand to retract the hammer, I have to release part of my grip, which doesn't give me as good a control. But from a theoretical point, whether or not it will fire, it doesn't really make any difference.

(Testimony of Lowell W. Bradford.)

Q. All right. Now I think you testified, sir, with respect to these three different ways of making the clicking noise, that if you release the hammer with the trigger while the gun is on safe, it won't fire, and you could continue to do that by simply pulling back the hammer with your thumb and releasing it again with your finger, and you would continue to make this clicking noise and the gun would not fire so long as the gun stays on safe?

A. That's right.

Q. But there's a difference with respect to these other types of clicking noises. Let us assume that you were producing this clicking noise by moving the safety up into the safe position. Do you understand what I mean by that?

A. Do you mean——

Q. With the hammer back.

A. You mean this movement here?

Q. Yes. I don't think you pulled the trigger, did you?

A. No, I didn't. I pushed, from my photograph which shows position No. 2, to position 3.

Q. You caused the hammer to fall by moving the safety [232] lever from the firing position to the safe position?

A. Yes. And to define it exactly, in referring to my photographs, it would be from position 2 to position 3 by simply pushing on the safety, cocking the hammer.

Q. All right. Now the next step I want to discuss with you is, if one did this in sequence, pro-

(Testimony of Lowell W. Bradford.)

duced a series of clicks in this manner, what would be the motions one would have to make to produce a series of clicks in that manner without discharging the gun?

A. Well, assuming that we start from the position indicated by Photograph C-3, it would be necessary to cock the hammer, and then by simply manipulating the safety.

Q. To produce a click by manipulating the safety? A. Without pulling the trigger.

Q. Without pulling the trigger?

A. Then it's necessary to push on the serrated part of this safety mechanism, which is on the side facing the hammer, push it forward, and this causes the hammer to drop to the position indicated in my photograph, C-3, to that position.

Q. All right. Now——

The Court: I want you to repeat that.

Q. (By Mr. Decker): Would you please repeat the maneuver, make a series of clicks in that manner? A. (Complying.)

The Court: Just repeat the same maneuver.

Q. (By Mr. Decker): Safe position. You don't have to disturb the position of the safety mechanism more than just to push it forward a little bit as you have indicated?

A. On one of those I did. There are some times when the safety does not move back enough to enable the hammer to stay in a cocked position. There is a small movement to the safety—not more than about an eighth of an inch—and the safety must

(Testimony of Lowell W. Bradford.)

come back just slightly when the hammer is retracted. If it doesn't, it won't hold the hammer. Then this appears to be somewhat erratic.

Q. But if it does not hold the hammer and the hammer slips and falls the way it's done there, the gun still will not fire?

A. Still will not fire as long as the safety is pushed into safe position with the "S" showing. "S" is in the center.

Q. I see. Now going to the third way of producing the click, which was simply by pulling the safety back, the hammer back to a retracted position, and then releasing it before it's locked in that position to produce a series of clicks in this manner, what actual operation do you do with your hand?

A. Well, the operation here is simply to take one of the hands, right or left, it's easier for me with the left, thumb the hammer and simply release the thumb, which lets the hammer fall, as I am now doing.

Q. Now, did you say that when the safety mechanism is in [234] the firing position, the hammer will not stay cocked back?

A. If it's in the full forward position, I just pushed it forward, the hammer, when it is retracted, will not always catch. Sometimes it will. But if I demonstrate that by pushing forward on the safety when the weapon is in position 3 of my photograph and then retracting the hammer, and this time it stayed—it doesn't always stay—but by holding the safety forward, I can demonstrate that it will not always stay.

(Testimony of Lowell W. Bradford.)

Q. I see.

A. And this corresponds to the operation—and you observe with the firearm in the fully cocked position and starting out with the weapon as indicated in Photograph 2, if I pass a certain point, the hammer will drop. Now logically if the safety is forward of that position, the hammer is not going to stay back. If it's back to that position, it will stay in a cocked position.

Q. Well, then, let me put this supposition to you. Supposing that this clicking noise was being produced by moving the safety mechanism all the way from the firing position forward to the position where the hammer is released. You see what I mean by that? I know it is not necessary, but let's assume that it was being done that way.

A. Yes, I see. You are referring now to starting out with position 3 as indicated by the photographs, and then [235] retracting the safety without touching the hammer.

Q. Let's assume we have the safety clear back in a firing position.

The Court: And the trigger cocked.

Q. (By Mr. Decker, continuing): And now we cock the gun, and now we produce the clicking noise by moving the safety forward to the point where the hammer is released. That will not fire, will it?

A. It will not.

Q. Now, if we do this sequence again?

A. Retract the safety from position 3 to position 1, according to the photographs. I retract the ham-

(Testimony of Lowell W. Bradford.)

mer from position 3 to photograph position No. 1, and then push the safety to position 2 according to the photograph, and then past 2 so we again resume position 3.

Q. Right. Now, wouldn't it be entirely conceivable for a man who has been producing the clicking noises in this manner, who has perhaps had one or two drinks of alcohol, so that his blood content is .14 per cent—you are familiar with that, I take it?

A. I am.

Q. 0.14. Would it not be conceivable that this man, who has been producing the clicking noise in that fashion, might very well forget and pull the trigger to produce the clicking noise instead of moving the safety forward? You see what I [236] am getting at?

A. I am not sure I followed the position of the gun.

Q. All right. Let's put the position of the gun with the safety in the firing position.

A. This is my photographic illustration 1, is it?

Q. Yes. Here's a man who has been causing the gun to snap but not discharge, a fully loaded gun, by moving the safety forward, as we have been doing, and then pulling it back and putting the hammer in the cocked position as it is now. Now if this man has had enough to drink so that he has 0.14 blood alcohol content, it would not be inconceivable at all, would it, for him to forget and pull the trigger in order to produce the clicking noise?

(Testimony of Lowell W. Bradford.)

A. Oh, you mean actually firing the gun by pulling the trigger in the normal manner of firing?

Q. That's right.

A. I don't know that I could answer that as to what would be conceivable.

Q. What would happen, though, if he should forget and pull the trigger?

A. Well, of course, if I pull the trigger, the gun would fire if there were a round in the chamber.

Mr. Decker: Thank you, Mr. Bradford.

The Court: Essentially, your other question was an argument, and one that you should address to me, not to him. [237] The result of what would happen is an appropriate question. Your other question was argumentative.

Mr. Murray: I have no redirect examination.

The Court: Well, that concludes your questioning, Mr. Decker?

Mr. Decker: No, your Honor.

Q. Just one sort of thing I am curious about, Mr. Bradford. How can there be a variation of more than two pounds in the amount of tension which you find is required to energize the—or to pull back that safety mechanism?

A. Well, first of all, it is an experimental fact and not uncommon. The things that I think are responsible for it are the way in which the moving parts that rub together lock each other—are finished. If they are finished accurately, usually there's a crisp give away at the right tension. If they are not finished off accurately, then we find variations.

(Testimony of Lowell W. Bradford.)

At least this has been my experience with mechanical parts of firearms.

The Court: In any event, it is normal to have variations?

The Witness: Yes, sir.

The Court: In moving parts of firearms, tension that's necessary to move it?

The Witness: Yes. As a matter of fact, this trigger [238] pull variation is much less than ordinary variations which I find.

Q. (By Mr. Decker): All right, sir, now one other thing. You have indicated, and I think it shows on your photograph, C-3, that with the safety lever in the safe position, the hammer does not come forward all the way to the firing pin?

A. That's correct.

Q. A width there which has been described as a sixteenth of an inch, but in any case, there is a width there. Now does that width vary with the position of the safety lever as you approach the full firing position?

A. I can best determine it by observing it. Yes, it does. As the safety is retracted from this position indicated in photograph 3, when the safety approaches the fire position, the hammer, of course, is released by the safety and it draws nearer to the firing pin.

Q. So you would say that the farther back the safety mechanism is toward the firing position, the more likely the gun is to discharge?

A. Well, in this position the hammer is not in

(Testimony of Lowell W. Bradford.)

a cocked position, so that in order to fire it, you would have to cock it and then pull the trigger.

Q. I understand that, sir.

A. I don't think you could say——

The Court: What Mr. Decker is saying is that with the [239] hammer in a cocked position, and if it then is released from the cocked position and the safety is just a little off of fire, that the distance between the released hammer and the firing pin would be less than that if it was on the full safe position.

The Witness: I don't think this reasoning would apply when you examine the gun in the hammer down position and try this safety actuation. I think in order to answer that question it's necessary to put the safety—put the hammer in a cocked position and then by successively trying the safety in different positions, you will find that there is a position where it will fire and a position where it won't fire. I don't think there's any tendency involved. I think it's a clean break-off point. I think that as long as this safety has the "F," meaning "fire," covered, why, the part that it goes under, that the weapon cannot be fired.

Q. (By Mr. Decker): But that is a position which is somewhat short of the full safe position, isn't it?

The Court: You mean of a full fire position?

Q. (By Mr. Decker): Full fire position?

A. Yes, that's what I said. Until you get the "F" well out from under its covered position—I

(Testimony of Lowell W. Bradford.)

have it now so that the "F" shows and the gun will still not fire. And until I pull it back to the point where it clicks into position, it will not fire. So that there actually is some time after the [240] "F" is exposed where it will not fire.

Q. You are using the word "fire" to mean that the hammer will not release when you pull the trigger? A. Yes.

Q. Let's assume we released the hammer by inadvertently dropping it while we are pulling it back with our thumb.

A. Well, let's see how that works by trial. No, even with the "F" exposed, it seems like, by trial and experiment here, that with the "F" exposed and still retracting the hammer and letting it drop inadvertently, it still will not contact the firing pin. You can determine this by starting out from a position——

Q. You are just making a visual observation now?

A. Yes, that's right. You can actually see what the hammer does.

Mr. Decker: I think that's all. Thank you, Mr. Bradford.

The Court: Any redirect examination?

Mr. Murray: No, your Honor.

(Witness excused.)

The Court: Would you get the—that which is in evidence, Mr. Clerk? Now, does the defense rest at this time?

Mr. Murray: Just a moment, your Honor.

The Court: Yes.

Mr. Murray: Let me examine the exhibits here, if I may.

The Court: You may. There's only one exhibit that's [241] not in evidence. That is Exhibit 5, Mrs. Harrington's statement, and you have read into evidence one portion of this, Mr.—

Mr. Murray: Yes, that's right, your Honor.

The Court: Other than that, there are no other exhibits that have been offered which have not been admitted in evidence. There have been some that are admitted subject to objection and subsequent motion to strike, but they are in evidence.

Mr. Murray: The defense rests, your Honor.

The Court: Any rebuttal?

Mr. Decker: No, your Honor, there's no rebuttal. The only problem we have remaining is the question of the proof of the letter or its contents referred to earlier in the afternoon. I would like to be permitted by the Court to submit the matter now with the right perhaps, pursuant to stipulation, to reopen for that limited purpose.

The Court: Well, you have the right to do it already without further—I am not ready to submit the matter in terms of actual submission, because I want to know what you want to do about argument.

Mr. Decker: Well, I meant——

The Court: You will conclude the evidence subject to the right to——

Mr. Decker: That's what I meant. I am sorry, your Honor. [242]

The Court: Well, I am not being semantical about it. I just want the record to be accurate. What do you gentlemen want to do about argument in this matter? You can't argue it now. I am talking about——

Now, do you want to orally argue it, and if you do, do you want to first develop any memoranda or authorities as to your positions? Mr. Murray has already some authorities cited for his position and he says that I should dismiss this action on the grounds that the evidence is insufficient.

Mr. Decker: And I have my authorities contrariwise already submitted to you, too, your Honor.

The Court: You think from an authority point of view that the authorities that are applicable to this kind of case have been set forth in our trial briefs?

Mr. Decker: Yes, I do.

Mr. Murray: I think so, your Honor.

The Court: All right, then, do you want to orally argue the matter?

Mr. Murray: Yes, your Honor, I would like to.

The Court: Do you want to, Mr. Decker? When can you be available to argue it orally? Can you do it tomorrow morning?

Mr. Decker: That's satisfactory with me.

The Court: You will have to do it after I get through a criminal calendar, but—— [243]

Mr. Decker: 11:00 o'clock?

The Court: I think 11:00 o'clock would be satisfactory.

Mr. Decker: Fine.

The Court: We are ready to argue at 11:00.

All right, then, we will hear you at 11:00 o'clock tomorrow morning.

Mr. Murray: Thank you, your Honor.

Mr. Decker: Thank you, Judge.

The Court: All right, then, Court will be at recess.

(A recess was taken until Wednesday, March 22, 1961, at 11:00 o'clock a.m.) [244]

Wednesday, March 22, 1961—11:00 o'Clock

The Court: Gentlemen, this is the time for argument. I know we are starting at a late hour. I think it would be wise, however—Do you think this would be argued within an hour? Do you think it would be wise to proceed and dispose of it in the morning, and then take a recess? From my point of view, I would prefer to go on through, but if you have other engagements, we can put it over. Which would you prefer?

Mr. Decker: I would prefer to go through.

Mr. Murray: I would, too, Your Honor.

The Court: All right. Would you proceed, Mr. Decker, and make the opening argument on behalf of the plaintiff?

Oh, by the way, the case I was referring to which had this accidental death is the case reported as the case of Ruth B. Ziegler versus the Equitable

Life Assurance Society of the United States. And it is a Seventh Circuit case decided December 7, 1960, and is reported in Volume 284 Fed. 2d, page 661. Now, this involves the case of whether or not it was an accidental death when a man who was undergoing diagnostic treatment for a mental condition and was in a hospital and went through a heavy plate glass window—the question whether he did that mistakenly trying to find an exit and, therefore, accidentally, or whether he did it as a result of unsound mind or deliberately as a suicide. They held that was a question for [245] the jury and sustained the verdict in favor of the plaintiff.

It covers some of the cases on the question of what is accidental and what is not. It was not without a division; it was a divided court, Judge Schnackenberg dissenting.

No, I am sorry. It is reversed on the presumption of an instruction that was given.

Mr. Decker: Presumption against suicide instruction.

The Court: But it held that the question was one of fact for the jury under the circumstances. I don't know that that helps us too much, but it is one of the recent federal cases on the subject.

Mr. Decker: Thank you, Your Honor.

I think preliminarily you will recall that the evidence was closed in this case yesterday afternoon but with the plaintiff having the right to introduce a letter written to Mrs. Harrington by the New York Life Insurance Company.

The Court: Yes.

Mr. Decker: Counsel has provided me with a photostatic copy of that letter.

The Court: Do you have any objection?

Mr. Murray: No, Your Honor.

The Court: It will be admitted as the plaintiff's next in order.

The Clerk: Plaintiff's No. 7.

(Letter from New York Life to Mrs. Harrington was received in evidence as Plaintiff's Exhibit 7.) [246]

The Court: What is the date of that letter?

The Clerk: Dated May 3, 1960.

The Court: It is in evidence. Now the evidence is closed.

Mr. Decker: That is correct, Your Honor.

The Court: You may proceed.

Closing Argument on Behalf of Plaintiff

Mr. Decker: May it please the Court, the contracts of insurance which we are concerned with in this case contain a double indemnity provision which provides that the double indemnity benefits shall be paid upon due proof that the death of the insured resulted, directly and independently of all other causes, from accidental bodily injury.

Now, preliminarily, to clarify the issues before the Court, I would point out that it surely is undisputed in the evidence that the death of Arnold Harrington was caused by the injury, that the injury was the sole cause of death. So we do not have

any proximate cause problems to concern ourselves with here. And we are able to restrict our concern to the question as to whether or not the injury which Arnold Harrington inflicted upon himself was accidental bodily injury within the meaning of the contract.

The Court: All right. Now, Mr. Decker, in the hopes that I may shorten argument, I think that it is proper at this time for me to indicate to you my impression, my present [247] impression, of the factual situation here, which I think I can do in a very few words. I would like to have you argue this question of whether the death was accidental under the impression of the facts I have.

I do not want to preclude you from disagreeing with my impression but I think I may shorten it when I say to you it is my impression the death here was brought about by the gunshot wound which was self-inflicted by the insured, Mr. Harrington, and that this was done unintentionally and that it was not done by reason of any intention to commit suicide. I have this impression because all of the evidentiary facts that would show any motive toward suicide are negligible, and in that respect I would then say that under the state of the evidence I must conclude that the preponderance of the evidence indicates that the gunshot wound was unintentional.

Mr. Decker: Thank you, Your Honor.

The Court: Now, I would go further. That it was caused by a dangerous, hazardous, negligent act

on the part of the deceased by pointing the gun at his head when it was loaded and he knew it was loaded, but that it was done without any intention on his part of producing the gunshot which caused his death. But when he did what was—he brought about his death by a self-inflicted wound in carrying out a dangerous, hazardous and negligent conduct on his part.

Now, under that factual situation, I would like you to [248] argue to me your idea of the law as to whether or not this is accidental or whether it falls within the other provisions that are set forth in the policy—as I take it, the policy excludes anything but an accidental death—or to put it another way in the affirmative, it has to be established that the act which caused the death was accidental.

Mr. Decker: That is right. I agree with that.

The Court: Now, I rule out the specific exclusion of suicide, mental condition, or anything of that sort. The evidence, I think, is all negative there. And, as a matter of fact, all the motivating forces otherwise would indicate that this was not done intentionally, that is, that the act was not done with the intention of taking his life.

Mr. Decker: All right.

The Court: So, you come to the question: Is the performance of a dangerous, hazardous, negligent act which does produce death one that would either make it accidental or nonaccidental?

Mr. Decker: All right, Your Honor. I have spent some time trying to analyze this problem and have outlined it in argument which is directed to

exactly this point. I would like to skip that portion of the argument in which I had intended to urge upon the Court that the evidence was clear that there was no suicide here.

The Court: Yes. [249]

Mr. Decker: As you have already indicated, as even counsel for defense has indicated, the primary facts which we are concerned with here are substantially undisputed. The dispute arises over the inferences, the ultimate fact which the Court is going to be required to draw from those primary facts. And this leads us then to the problem that in order to draw the ultimate inference we must ascertain what the law says is the test which separates accidental bodily injury from nonaccidental bodily injury or some other type. In other words, what does the law say is an accidental bodily injury as it is used in this contract of insurance?

The Court: And I think I would like to have you sharpen it just a little further in this respect: What does California law say that it was? And if there is no direct California authorities, then what would be persuasive? I think one of my problems here is perhaps to determine what would the Supreme Court of California hold under a similar set of facts? As far as I know, there are no directly applicable California cases on the facts.

Mr. Decker: There is no case on the nose, as it were, Your Honor.

In analyzing this, what I would like to do is pose the view the defense takes as to what the law says the test is and the view that the plaintiff takes. The

defendant, in effect, urges to the Court that if the injury resulted from a voluntary [250] action, the natural and probable consequences of which was the injury which in fact occurred, then the injury may not be deemed to be accidental within the meaning of the policy. And the defendant cites in support of this proposition two California cases, the Postler case and the Price case, and one Northern District of California case, the Eraldi case, and then a series of decisions from other jurisdictions.

The plaintiff's position is that the law applicable here, the test which is imposed by the law, is just this: Did Mr. Harrington, in fact, anticipate, expect, foresee, or intend that the conduct which he engaged in would result in the injury which he incurred? This, it seems to me, is the divergence between the positions as to the applicable law.

Now, the plaintiff relies, in asserting that this is the test, upon a long line of California cases commencing with the leading Rock case which is cited in the plaintiff's memorandum and followed by a whole series of cases, the Rooney case and others up to and including Zuckerman, which is the last Supreme Court case in this area (a 1954 decision), and including also a District Court of Appeals case, the Davilla case. All of these are cited in the plaintiff's memorandum.

Now, the significance of these decisions, I urge upon the Court, is this: In every one of them the Appellate Court had before it an insurance contract which provided that the double indemnity benefit, or whatever benefit was being sought, [251] would

be payable if death resulted from violent, extraordinary and accidental means. And I am going to refer to these cases in my argument as the accidental means cases. In every one of these decisions the courts distinguished between the degree of proof required by the plaintiff where the policy reads "accidental means" as opposed to the degree of proof required in situations where the policy insured against accidental result. A distinction is clearly pointed out in all of these decisions.

Now, it is also true that in all of these decisions the Court was dealing with an accidental-means policy. None of them are accidental-result policies, and my research has disclosed no California decision which would be a case on the nose, because I can find no California decision where the Court applies the greater degree of proof as indicated is the proper degree of proof in the accidental-means case to a policy which does not provide for a recovery on accidental means, if Your Honor follows me.

The Court: I think I follow you.

Mr. Decker: It is not an easy thing for me to explain.

The Court: I don't think it is easy for the Courts to explain, either.

Mr. Decker: But the distinction is important. The language which says in an accidental means case the plaintiff must prove that there was some element of unexpectedness or unforeseeability in the means which led to the result—The [252] Court, in effect, says this is not an accidental result case and, therefore, the plaintiff has to prove more here, you

see. He has to prove something about the means rather than just the result. All of those cases you could say, I suppose, that the talk of the amount of proof required in accidental result cases is dicta. But, nonetheless, it is there, a distinction clearly recognized by a whole series of California authorities.

Now, interestingly enough, there is a case by the District Court of Appeals—this is the Ritchie case, Ritchie versus Anchor Casualty Company. Now, the facts are a little different here but the policy did provide for liability by the insurer in the event of accidental result as opposed to accidental means. There was no accidental means language in the policy. And in that case the District Court of Appeals—it is a fairly recent case—points out that all that is necessary in this type of case for the plaintiff to show is an unexpected and unforeseeable result of a voluntary act. The language of the Court is: “As we deal only with an ‘accident policy,’ the unexpected and unforeseeable result of a voluntary act fulfils the term of the policy as to the event covered thereby.”

The Court: Now, “unexpected” by whom? That is, unexpected by the person performing the act or unexpected by a reasonable man test?

Mr. Decker: This the District Court of Appeals, like all the other courts in the decisions I have read in this area, [253] failed to elucidate on. I think the only light on this is the use of the word “unforeseeable” rather than “unforeseen.” This, it seems to

me, would indicate that the writer of that opinion was thinking of some sort of objective test.

The Court: In other words, what the reasonably prudent person could or could not foresee would result from that act?

Mr. Decker: Yes.

The Court: As a voluntary act but which was done not with the intention of producing a bad result?

Mr. Decker: Yes, sir.

Now, to the extent that this would indicate the Court is thinking about an objective test, that is, a reasonable man test or something of that sort, and not concerning itself with what the state of mind of the doer is, that conflicts with the language of the long line of decisions I have researched, where the language indicates the Court is thinking of what the actor had in mind at the time. But I think this seems to be the law which we can find in the California cases on this question.

The following reasons are advanced to the Court by plaintiff to support our contention that the defendant is wrong in its position, that is, that if the insured voluntarily exposed himself to a risk which was great, that the natural and probable consequences thereof would be the injury that he sustained, then this is not accidental. The reason I think the [254] defendant is wrong in this position is as follows: In the first place, all of the cases relied upon by the defendant, so far as I am able to ascertain, are accidental means cases. Now, the insurance company in this case has chosen not to use the words

“accidental means” in its policies. And it has done that in the face of a long series of decisions going way back to the early twentieth century which say there is a difference between the amount of proof required by the plaintiff in an accidental means case as opposed to an accidental result case.

It would seem to me that referring to the usual rule that if there is ambiguity in an insurance contract, it is to be resolved against the insurer, that this is Point 1 which the Court might assert as being a defect in the defendant’s position here.

Now, Point 2, and perhaps more important: Even if we assume, Your Honor, for the purpose of argument that this Court, in attempting to determine whether or not the ultimate fact here is accidental or nonaccidental, even if we assume that the test which the defense proposes is the proper one, the defense is still wrong in this case because that test says that this is no accident if Mr. Harrington voluntarily performed an act the natural and probable consequence of which is the injury which resulted. The plain fact is that Mr. Harrington voluntarily—Let me put it this way. The plain fact is Mr. Harrington did not voluntarily put a loaded gun to his head [255] and pull the trigger. This is the statement, by the way, which appears in the defendant’s statement of facts in its trial memorandum. “It is admitted that Mr. Harrington then put the gun to his right temple and pulled the trigger.” I guess that is what I have in mind, that statement in the brief that it is admitted that he put the loaded gun to his head and pulled the trigger. This

was not his voluntary act. His voluntary act, Your Honor, was to put a loaded gun, which he thought was on "safe" to his head and then either release the hammer or pull the trigger—release the hammer in some way. The point being that the word "voluntarily" is a term of art in these cases. And the inference to be drawn here is that if he did not commit suicide, then it is clear, I think the Court must find, that the gun was in the safe position when he put it to his head.

The Court: Or he thought it was.

Mr. Decker: That is correct. It is clear that he thought it was, because he was familiar with the gun. He had been snapping it. It hadn't been discharged, so if he didn't intend to take his life, the inference must be drawn that he thought the gun was on "safe." And this is supported by his statements immediately prior to the incident. So the voluntary act was not to point a loaded gun but to point a loaded gun, which he thought was on "safe," to his head.

The Court: I am willing to find the facts in accordance [256] with that statement: that he thought that the gun was on "safe," mistakenly thought that.

Mr. Decker: Yes. Now, with this finding of fact, then, even under the test imposed under the accidental means cases, which I claim are not applicable here because this is not an accidental means policy, but even under that test this was an accident. Let me refer to two cases, California cases——

The Court: Are they in your memorandum?

Mr. Decker: One of them is and the other is not. The first case, *Cox v. Prudential Insurance Company*, 172 Cal App 2d 624, which is in the memorandum, and is discussed there; and the other case is the case of *Stokes versus Police and Firemen's Insurance Association*, which is found at 109 Cal App 2d, Supplement 928, a decision by the Appellate Division of the Superior Court here in San Francisco.

Both of these are cases where the policy sued upon provided for recovery in the event of death occurring by reason of "extraordinary, violent and accidental means," and they both illustrate that if the conduct of the decedent, be it means or whatever you want to call it, the actions of the decedent which immediately preceded the injury or death contain an element of unexpected peril, something which he subjectively did not anticipate, then the death or injury which results is not death or injury by accidental means as that term is set forth in the policy. [257]

The Court: It is not? You say it is not accidental death in that situation?

Mr. Decker: It is accidental death. I mean it is death by accidental means.

Now, for example, in the *Stokes* case a San Francisco fireman was called in his regular course of duty to a fire and he undertook to carry out his duties. He voluntarily went into the building where the fire was raging and he handled hose and worked hard at trying to put out the fire. He became quite ill and later, I think four days later, died of a heart

attack. The Court pointed out that there were unexpected, hidden and unknown dangers occurring in that fire itself. The fire was one where there were explosions which took place or combustible materials in the building which created tremendous heat problems; and this, the Court said, was an unexpected element which Mr. Stokes did not anticipate which made his death an accidental death within the accidental clause of the policy.

Now, the reasoning leaves something to be desired——

The Court: You are talking to an old volunteer fireman who has had considerable experience sniffing smoke, and I know how unexpected things can occur when you have combustible materials. And this produces a strain of the heart. And you are talking to the former counsel for the California State Firemen's Association and a former Senator who was instrumental in having heart trouble and pneumonia added to the causes of [258] compensation. So I have heard this from the judicial and other aspects, and I have heard the experts in the field argue this question of heart trouble and pneumonia as part of the occupational hazards. I have heard this argued by experts pro and con, so when a fireman goes into a burning building, he goes into an unexpected situation.

Mr. Decker: I cite the case to show that the term "voluntary" is a term of art.

The Court: I am sure it is. "Voluntary" is a word of art.

Mr. Decker: Now, I think that is the test of the

defendant. I deny this is a test because I think the accidental means cases did not provide us with the test here but, nonetheless, I am arguing the case on their ground here.

The other case, the Cox case—In this case a young man was in custody and was being transported to another place of custody. He was in handcuffs seated in the back seat of the police car. He threw himself out of the car while the car was in motion going down a street in heavy traffic. He threw himself out of the back door of the car toward the side where the traffic was and he was observed by the witnesses who testified in the case to have fallen on his back and then to have come to a half-seated position and turned and looked over his shoulder to see traffic coming toward him. And at this point he made a mistake. He threw himself in the direction of a big [259] truck that was coming by inside of him the other way.

Now, here is a man obviously performing an act which one must say is highly imprudent and dangerous and, as a matter of fact, I think it would even fill the test that defendant urges here, that he should have foreseen that a highly probable consequence of this would be in being run over by a car coming along behind——

The Court: Either that or bounced on his head from going out of the moving car and suffering an injury that could kill him that way or seriously injure him.

Mr. Decker: All right. Now, of course this was

argued to the Appellate Court, but the Appellate Court pointed out that after he fell to the pavement, he sat up, indicating that he was all right that far, and then he looked—that the Court could not hold, as a matter of law—he had gotten a verdict below—the Court could not hold as a matter of law that going to his right instead of to his left was something that he should have anticipated would result in his death.

Now, I rely on it here to support my contention that the word “voluntary” is a California word and contains this element of unexpected or unforeseeable. If the element of unexpectedness or unforeseeability is there, then the result is accidental. And this is in an accidental means case.

The language of the Court which is helpful in this area is found in *Davilla v. Liberty Life*. “The injury is accidental—” [260] an accidental-means case again—“if, although the actor is doing what he intends to do, his course of action is interrupted by some unforeseen or unexpected happening.”

Now, in this case I contend that the unexpected happening or the unforeseen happening was the “safe” being in the “non-safe” or firing position instead of where he thought it was.

I think it can be said in both the *Cox* and the *Stokes* cases that the Court was seeking a way to overlook the technicalities of proof previously required. I think the tendencies of modern courts is to regard “accidental” as Mr. Justice Cardozo said in a dissenting opinion. He said, “If a death occurs in circumstances where it would commonly be re-

garded as an accident, it is an accident." This has been adopted in many states, though not in California. But in the Cox case the Court, though not adopting the rule directly, refers to it sympathetically and makes the implication that if it were necessary to adopt the rule, it would be adopted to sustain the verdict below.

To digress a moment, here we have a situation where the insurance company is out selling insurance with the language that "If your death results from accidental bodily injury," then it is only right and just and proper for the Court to say to such insurance companies, "You are telling people that if death results to them by reason of what the ordinary person would say was an accident, then your beneficiary is entitled to [261] double indemnity benefits." And I think it is quite proper and just for the Appellate Courts to hold the insurance companies to their promises and their obligations.

Now, I have already indicated to you why I believe the defendant's position is wrong. The cases relied on are distinguishable. They are all accidental means cases or they are extra California jurisdiction cases. I have already indicated to you that even if we assume that if the defendant is right that the test urged upon the Court by the defendant is the correct one, that on the facts of this case it still results in a plaintiff's verdict because Mr. Harrington's voluntary act was to put a loaded pistol to his head, thinking that the safe was on. And the fact that the safe was not on but was in the firing position is an unexpected, unanticipated element in the

case which makes the means test urged by the defendant inapplicable and results in this situation being deemed an accidental death.

Mr. Harrington exposed himself unanticipatingly to an unknown peril just as Mr. Cox did when he went to the right or Mr. Stokes did when he found hidden, unexpected dangers when he fought the fire.

I have nothing further to say here, unless you have some questions.

The Court: No, I think you have made your point very well. I have my impressions and you have argued very well. [262] The question is purely one of how you apply the law to the facts in this case in order to get the essence. This is the principal problem here. I think that as a federal judge I am in a first-impression situation factwise applying the law of the State of California. And therefore I must make an effort to determine what the court of last resort of the State of California would hold in a similar situation. This is the standard which I must follow.

Mr. Decker: Well, in that situation the Zuckerman case which is the last California Supreme Court case indicates the distinction. And the Cox and Stokes and Ritchie cases indicate that the California law would follow the rule urged by the plaintiff.

The Court: Well, I must attempt to search with great care what I would deem the California courts would hold in this situation. And you have argued this point very well, Mr. Decker, and you have argued it under the California law, which I think is

the California law. Other cases from other jurisdictions are not binding but may be persuasive.

Now, Mr. Murray, I would like to say to you that I have given you my impressions, as I have given them to Mr. Decker. You are not bound by my impressions, but I think my impressions are firm on this matter, namely, that I have ruled out suicide. It is my impression from the evidence that I would have to find, as to the facts in this situation, that Mr. Harrington pointed [263] the gun at his head with the thought or belief the safety was in a safe position. And by some means or other, whether by pulling the trigger or otherwise, caused the hammer to be activated against the firing pin, and when the gun was not, in fact, on the safe position and thereby caused the gunshot which produced his death.

These are my impressions and I have to do this by inference. But I infer from the facts that I think that these are the basic facts on which I have to make my decision; and while you may or may not have some other notion of the facts, I would at least require you to argue that aspect of the facts. You may argue otherwise, but you have to attempt to persuade me that my assumptions or impressions are in error. I wanted to get it narrowed down, if I could.

Mr. Murray: Your Honor, I am quite prepared to argue the case on this basis, and I will be happy to do so.

Closing Argument on Behalf of Defendant

Mr. Murray: Your Honor, we think that on the undisputed facts the plaintiff's view of the case, which Your Honor to some extent appears to have accepted—we think that on the undisputed facts Mr. Harrington's actions were so inherently dangerous that death, when it occurred, was not accidental. We think this is clear from the California cases and we think it is clear from the other cases in other jurisdictions.

Now, as Your Honor knows, Mr. Harrington took a gun [264] which was fully loaded, as he knew, tampered with the safety mechanism or trigger, made a snapping sound with the hammer of the gun, did this for a period of minutes, and then pointed the gun to his head deliberately and either pulled the trigger or continued snapping the hammer.

Now, Your Honor, I find it difficult to conceive of anything more dangerous than this course of conduct, short of suicide, and Your Honor will agree that the conduct is hazardous.

The Court: Well, it is hazardous all right.

Mr. Murray: Now, Your Honor, I think it is clear that the cases show this is not an accidental death. But first I would like to clear away what I think is an irrelevant discussion of legal principles as raised by Mr. Decker. Your Honor, I don't think anything depends in a case such as this on whether the policy insures against accidental death or accidental means; nothing at all. Now, it is true that the policies have different clauses, accidental means and accidental death, and in some circumstances

these distinctions are relevant. But in circumstances such as these, where a man deliberately courts danger and does an act hazardous in the extreme and death results from that act, the courts make no distinction between accidental death and accidental means. The proof of this, Your Honor, is in the cases we cite: The Postler case, in California the leading case; the Price case; and the Eraldi case in this District. [265]

I would like for the moment to quote, Your Honor, from the language of the Postler case, quoted on page 5 of our brief. The Supreme Court of California says—in what is the only California case which is close to this case—“An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means.”

The Court: Now, those probable consequence standards, are these based on the reasonable man test? In other words, are they an attempt to use the reasonable man as a standard by which we judge human conduct?

Mr. Murray: Yes, your Honor, I think the cases tend in this direction.

The Court: And not the subjective standard of what the person involved thought?

Mr. Murray: No, I think this is perfectly clear. Except for some dicta dealing with different types of situations, all of the cases that deal with this question talk in terms either of foreseeability or deliberately engaging in an act which a normal person would realize is highly dangerous.

The Court: Are you saying to me that whenever

a man knowingly participates in or carries out a dangerous or hazardous act, his death or injury therefrom is not accidental?

Mr. Murray: No, your Honor, I think there should be something more than that. I think it should be highly dangerous, [266] dangerous in the sense we all realize is shockingly dangerous. And also a needless act, no rational reason for it.

The Court: Oh, no, I am not talking about emergency actions. I am not getting into that argument. I am talking about the situation where you say a man does a needless—or do you want to use the term “grossly negligent”?

Mr. Murray: Well, I say needless when he performs an act needlessly which a prudent man recognizes is highly dangerous.

The Court: You wouldn't say that if he does dangerous work, that if death resulted, this wasn't an accidental death?

Mr. Murray: No, your Honor. That's why I think the fireman's case is of no point here.

The Court: I follow you then. Go ahead.

Mr. Murray: Your Honor, I have read the cases cited by Mr. Decker's brief and as I recall—I can run through them one by one—except the Cox case, none of them involve cases extremely hazardous, acts at all similar to this case. I don't suppose Mr. Decker would dispute that, and he cites them only for the purpose of distinguishing between the terminology “accidental death” and “accidental means.” And as I pointed out, the cases which deal with acts like this do not make this distinction.

Now, our cases. The first one is the Postler case, the leading California case—— [267]

The Court: It isn't your contention that the Postler case has been overruled?

Mr. Murray: But not in this respect.

The Court: You are firm in that position?

Mr. Murray: Oh, I certainly am. If I weren't, I wouldn't have cited it in my brief.

The Court: I know. You made a note that it has been overruled. Well, this is very good practice. I just wanted to be sure how firm you were.

Mr. Murray: The Postler case arose on these facts. Postler was a man who had lost money in a gambling club in the city of San Francisco. So he went out and got a gun and came back to the club to get his money with the threat of a gun. Well, he did get the money but on the way out he was killed in an exchange of shots. The Supreme Court of California reversed the judgment on a jury verdict on the grounds that since the death of Postler was an ordinary consequence of his act in coming in and getting the money with the gun—since this was the normal result to be expected, his death was not accidental. This is the leading case of California.

It follows the Price case decided a year before, which was not overruled in any respect.

And the same rule was followed in this court in the Eraldi case, cited on page 5 of our brief.

“Deceased engaged in an encounter under [268] such circumstances that he invited his adversary to mortal combat and either foresaw or should have foreseen that death or injury would result.”

Now, your Honor, these cases do not deal with aiming a gun at oneself, but I think in every other respect it is the same. The rule is, if a man puts himself in a predicament where death may reasonably result, the death is not accidental—and you will remember that the Postler case makes no distinction between accidental death and accidental means policies.

Now, other jurisdictions. *Ford vs. Standard Life Insurance Company*, cited on page 6 of our brief; this is a case where Ford was the assured, a member of a religious group in the South which held that snake bites would not hurt annointed members. Ford, assuming he would not be bitten, fondled a rattlesnake at a dinner and was subsequently bitten and came to his death. Now, the Court said:

“Was the death of the insured under the facts heretofore shown due to accident?

“We do not have a state of facts where one is bitten by a poisonous snake while walking through the woods or fields. The snake does not suddenly and without warning come on the insured and bite him. The insured of his own free will voluntarily handled the snake without any attempt to protect himself. Certainly this voluntary assumption of this risk is not accidental. [269] It was his own design. The misconception of the biblical command or language of the Bible would not excuse a person and allow him to profit thereby.”

The Court: If you would alter the facts a little, you might get into some problems here. Supposing you are a reptologist (sic) or a snake hunter, and

of course snake venom is very valuable, and I know people who hunt rattlesnakes and extract the venom. It is done by persons of skill and knowledge but accidents do occur though death very rarely occurs. Now, this is common practice with rattlesnakes. In those circumstances, doing a dangerous thing, but doing it because this is a practice common to it, had some purpose to it, I presume this would take it out of the facts of our present case?

Mr. Murray: Oh, surely, your Honor.

The Court: Now, this is the explanation you were trying to convey to me when I asked you that question?

Mr. Murray: Yes. And then taking all necessary and proper precautions that could be taken under the circumstances.

The Court: And this can be transposed——

Mr. Murray: We can transpose the facts to hunting. And I suppose the facts can be transposed to gun hunting.

The Court: Oh, yes.

Mr. Murray: Your Honor, I would like to talk now about two cases, both of them dealing with the use of guns and both of them, I think, being extremely close to this case. The first [270] of these is *Thompson vs. Prudential Insurance Company of America*. This is cited on page 6 of our brief. Thompson was a young man who had a revolver with circular chambers. He determined by experiment that if he put just one bullet in the revolver and spun the chambers, the bullet would end up

in the bottom chamber because of gravity. He tested this out and this is the way it worked. He placed a cartridge in one chamber and relying on this supposed circumstance, he spun the cylinder, revolved the chambers and pulled the trigger—and was killed.

The Court: You claim that parallels this case?

Mr. Murray: I think it is very close, your Honor. Now, the Court in that case affirmed a directed verdict for the defendant. And I would like to read one sentence: “One engaging in such a bizarre pastime with a lethal weapon, if he be compos mentis, knows that he is courting death or severe injury, and will be held to have intended such obvious and well-known results if he is killed or injured.”

I think the case is extremely close, your Honor. This chap relied upon a mistaken circumstance, pulled the trigger in the same fashion as Mr. Harrington relied on it being in a “safe” position. In both cases it is obvious the insured acted in an extremely hazardous and extremely reckless fashion.

Now, in these circumstances it is not accidental within the meaning of the policy.

The next case is *Baker vs. National Life and Accident [271] Insurance Company*, cited on page 7 of our brief. This is a case in which Baker invited some of his friends to shoot a two-by-five-inch pepper can off his head, invited the friend to shoot it off with a revolver from a distance of eight or ten feet. Now, just as the friend was squeezing the

trigger of the gun, the can started to fall from Baker's head, and Baker jerked his head up to maintain the can in the proper position. The friend was already squeezing the trigger so it was too late to stop, and Baker was killed.

Now, the Supreme Court of Tennessee affirmed a dismissal of the action on the ground that the insured should have foreseen that death or injury could result from his voluntary act. Later on the Court said:

"Death is not courted by accidental means if it is a natural and foreseeable result of a voluntary, though unusual and unnecessary act or course of conduct of the insured. Target practice with a pistol and with a pepper can sitting on the head of a human being as the target is neither a reasonable nor necessary avocation. One who volunteers his head for such an experience must anticipate injury, if he is a normal person."

It seems to me, your Honor, that the cases we cite in our brief—several of them are close, two being on all fours, your Honor, and in all those cases the Court either directed a verdict for the defendant or entered an involuntary dismissal [272] of plaintiff's action.

Now, I would like to talk for just a minute on two cases on which Mr. Decker relied in his argument.

The Court: The Cox and the Stokes cases?

Mr. Murray: I think I have already discussed the Stokes case sufficiently. The difference in the

Stokes case was that the fireman was doing his duty, a normal course of activity.

The Court: I see the distinction there.

Mr. Murray: And I think that although the distinction is not so clear in the Cox case, the same distinction applies.

The Court: Let's see that one.

Mr. Murray: Now, in the Cox case, Cox was in the custody of police officers and, in an attempt to escape from death, pushed open the door and fell into the road. Now, the car was going 30 miles an hour and Cox, when he fell to the road, was not injured. At least there was no evidence of it. He sat up and looked about. Now, what Cox did as he looked about and saw there was traffic coming, and in an effort to escape his predicament and peril, he moved to the right to escape being run over. He moved the wrong direction and was run over by the traffic.

The analysis of the Court seemed to be something like this. The question was whether Cox had died from accidental means within the terms of the policy. Now, the Court said that [273] Cox's fall to the road did not result from accidental means because it was deliberate. And if he had been killed in the fall, that would have been the end of the case. The Court went on to say, however, that once he was in the road, Cox was faced with the situation where he felt he had to act to escape whatever peril he was in. Now, he made a mistake, but the Court held it was necessary to affirm the verdict of the trial court in favor of the plaintiff because the Court could not say as a matter of law that Cox,

in moving to his right, could reasonably have foreseen that he would be killed in the situation in which he was placed.

I don't see, then, where the Cox case has much to do with this case. Cox was trying to escape from a situation of peril whereas Mr. Harrington deliberately placed himself in a situation of peril.

The Court: Foolishly.

Mr. Murray: Yes, foolishly. I didn't use that word but I think that is absolutely true. Recklessly.

Now, on page 5 of his brief Mr. Decker quotes the Cox case:

"It cannot be said as a matter of law that Cox knew or reasonably could have anticipated that in going to his right he would be run over by the truck." Now, this is not very far from the rule we are urging upon the Court here. Perhaps Mr. Decker and I do not have a quarrel on [274] this. I think the answer must be clear.

The Court: What do you mean by the answer must be clear?

Mr. Murray: In this case it is very difficult to say that Mr. Harrington, in playing with the magazine of the gun, could not reasonably have foreseen that he might be killed. I think that inference is clear, that he could have been.

The Court: He either knew or should have known that he was doing a dangerous thing.

Mr. Murray: And I think that once you have decided that, that that is the answer of the case.

The Court: Well, I appreciate your argument, but I don't think——

Mr. Murray: Well, according to our view of the case.

One thing more about the Cox case. The Cox court, in reaching this decision, found it necessary not to overrule but to recognize and distinguish the very cases which we rely upon in this case. And I would like, if I may, to read you a sentence from the Cox case. This is on page 638, your Honor:

“Appellant cites several other cases in support of its contention that the death was not caused by accidental means. Those cases are factually distinguishable from the present case. It may be stated generally that in those cases the death was the direct result of the voluntary act of the insured (such as jumping from [275] a high building or the top of a moving train) and no act of an intervening agency was involved; or that the death resulted from performing a dare-devil stunt (such as handling a rattlesnake, playing Russian roulette or permitting a person to shoot at a can on the insured’s head); or that the death resulted from fighting with guns.” So I think, your Honor, it is clear that the authority of these cases has not been impeached in this Cox case. The last word of the California courts is the Postler case.

Now, your Honor, I am about to conclude and I would just like to say this. Mr. Decker has told us that what was unforeseen, according to Mr. Harrington, was that the safety was moved from “safe” to “firing.” Now, I think, your Honor, that the cases are clear that the question is not whether

Mr. Harrington foresaw it but whether a prudent person could have foreseen it.

But I want to talk a minute about that safety. It seems to us that the manner in which Mr. Harrington was fiddling with the gun underscores our position. Your Honor, it is dangerous enough to point a loaded gun at your head and pull the trigger relying on the safety mechanism, but to do that after monkeying around with the hammer and the safety so that you have no idea of what position it is in, and then pull the trigger—your Honor, this is hazardous in the extreme. It is difficult [276] to conceive of anything more hazardous than this.

The Court: All right. Thank you very much, Mr. Murray. You have made your point very well.

Now you may close, Mr. Decker.

Mr. Decker: Thank you, your Honor. I will be quite brief.

Rebuttal Argument in Behalf of Plaintiff

Mr. Decker: I think, your Honor, it is clear that there are situations where the courts have considered that it would be unreasonable to extend the risk which the insurance company wrote when it insured against accidental death or death resulting from accidental means to such situations as Russian roulette cases. It would be unreasonable to extend the risk on the insured to the handling of a poisonous snake, but nevertheless the courts have not dealt with this problem in such a way as to give us a very clear guide in handling cases on a case-to-case basis as to where that line is drawn.

As a matter of fact, in the cases which I have cited to the Court there appear statements by the writers of the opinions to the effect that each case must be decided on its individual facts. And it is obvious that the appellate courts are having considerable difficulty with this problem, particularly in view of the hopelessly involved mess they got themselves into when they started distinguishing between accidental means and accidental result. [277]

The rationale which I would offer to the Court for consideration—and let it be understood I am not abandoning my argument that the simple way to dispose of this case is to say this is not an accidental means case but an accidental result case, and the long series of California cases beginning with *Rock* have told us that all that is expected, if the provision is accidental result rather than accidental means, is that the result be unexpected or unforeseen. That is the simple way to dispose of this case and I think it would be correct on the basis of the California authorities. But I want to offer a rationale to the Court which would attempt to deal with this problem of there being some areas of risk where it is unreasonable to expect the insured to recover, such as the *Russian roulette* cases. And the key to this rationale is found in the language of one of the decisions relied on by counsel for the defense.

In the *Thompson* case, one of the south-of-the-Mason-Dixon-line courts relied upon here, the Court is discussing the young man who experimented and found that the cartridge would always come to

rest at the bottom, and it says this: "In such case, it will be presumed that the participant intended that he should be killed or injured should fate stop the cartridge in the spinning cylinder in firing position." He does more than simply a highly-dangerous thing; he does something else. He anticipates suggestively himself that, A, he [278] will not be killed; but, B, he will be killed if fate does not work out the way he is tampering with it, in effect.

Now, this would explain the result in the snake case. Here is a man who tempts fate. It would explain the result in the Postler case relied on so heavily by counsel. In the Postler case there was a gun fight and it may easily be said there that the real position of the Court was that this man, in engaging in armed warfare, anticipated that if he did not kill the other fellow, he would be killed himself. So as a matter of subjective intent or anticipation, it can honestly be said that he anticipated death or injury.

Now, Mr. Harrington's case is not this type of situation. Mr. Harrington, according to Mr. Chow, was thoroughly familiar with the way the safety mechanism on this gun worked. Mr. Harrington had been snapping the gun, although it was fully loaded, and it was not discharged—in other words, he was testing the efficacy of the safety mechanism.

The Court: At least he was certainly relying upon it.

Mr. Decker: And then he relied upon it to the tragic result which occurred. He was not anticipating that if the safety mechanism did not work

he would be killed. This was not in his mind. It could not have been. He was not gambling and tempting fate; he had tried out the safety mechanism and, according to Mr. Chow, he was thoroughly familiar with it. This, to me, is the distinction. He was not tempting fate in [279] the sense of saying, "Well, if it doesn't work, I will be dead." The fact of that safety mechanism not working was the last thing in his mind. So from the point of view of this rationale, there is the distinction between the hard cases which have made the bad law and this case.

The Court: Well, I don't know that they made bad law. They may be hard cases.

Mr. Decker: Well, it is pretty difficult to distinguish them on a rational basis. We have to distinguish them on a case-to-case basis. In the Cox decision, which counsel has just discussed with you, the Court doesn't say why the other cases are not applicable. It doesn't discuss the theory which the Court uses in the other cases. It just says they are not like this case.

So I offer this rationale to the Court as being the distinguishing thing. And, finally, the Postler case was a fight between two men armed with guns.

But then we come to the Rooney case cited in my memorandum, a California Supreme Court decision, if I am not mistaken. In any event, the assured in this fist fight was knocked to the ground and his skull was split open and he died. And this was held to be accidental within the meaning of the accidental means policy. Now, surely this man, in

embarking on a fist fight, was just as subject to censure as Mr. Murray said should be ascribed to Mr. Harrington here. His death was [280] accidental within the meaning of the accidental means policy.

So it is only the hard cases like the Postler case where a man engaged in armed warfare or lays down on a highway and waits for a car to run over him to show off to his friends, or engages in snake chucking, or engages in Russian roulette, that the Court says, "This is too much. We are not going to say the company needs to pay in this kind of thing."

Thank you.

The Court: All right. Thank you, gentlemen. You have both very ably argued one of these difficult questions of fact and law. The facts are not hard to infer; they are almost undisputed here. The parties might disagree with me as to what inferences should be drawn and might want to argue that I should draw one inference or another, but I think they come out pretty much as I have indicated.

And the points of law involved are stated in varying ways in many cases. The problem really is in making these points apply case by case, and this is one of those cases which has a very, very close problem in whether or not one principle should apply or another. And so it depends on the meaning of words and upon, I suppose, the weighing of the probabilities that have to be weighed in determining these questions.

And all I can say is I must review these cases. I haven't had a chance to study the case law as much as I would [281] have liked to. I think I have a good grasp of the facts. I have looked at the language of the policy and have read some of the cases. I think this I must do before I finally decide the matter. [282]

Friday, April 14, 1961

The Clerk: Harrington versus New York Life Insurance Company, for hearing on plaintiff's motion to amend complaint.

Mr. Decker: At this time, if the Court please, the plaintiff moves the Court for an order granting her leave to file an amendment to her complaint to conform to the evidence heretofore adduced at the trial and, additionally, for an order making findings of fact and conclusions of law on the issue of interest which was expressly left open in the Court's decision. I have heretofore deposited with the Court a copy of the amendment to the complaint which I propose and also a copy of the findings of fact and conclusions of law on the issue of interest which I propose and have served copies of the same upon counsel.

The motion is made on the ground that to allow the amendment would be in the interest of justice and consistent with the rules of the Court, and with respect to the proposed findings of fact and conclusion of law, the motion is made consistent with the authorities which I have cited on page 2 of the written motion filed with the Court.

The Court: Well, Mr. Decker, as I take it, the facts you are proposing to plead in the proposed amendment do conform to the proof insofar as it appears of record what was done. I understand there is no real dispute of fact here, but the [283] legal duties that flow or the legal liabilities that flow from this are really the matters in question.

Mr. Decker: That's correct.

The Court: If I were to conclude that you are not entitled to interest upon the circumstances mentioned here, I should deny your motion to amend because there is no issue. In other words, the real problem is what you propose to amend—is what you propose to add to the complaint by way of amendment and the proof that was offered, is it a material matter to be considered by the Court? And I would therefore like to hear your theory of it being permitted—of being entitled to interest as you claim you are from the date that there was a rejection of the claim.

Mr. Decker: Very well, your Honor.

The Court: Rather than from the date of the judgment.

Mr. Decker: Very well, your Honor.

The Court: I would like to hear you tell me that so that when Mr. Murray gets up to answer, he won't have to be wasting his time about what your theory of law is. This, in my opinion, is purely a question of law because the facts are undisputed.

Now, Mr. Murray, am I correct in that assertion that the basic fact, that is, the documentary evidence itself, as to when certain things were done, is undisputed?

Mr. Murray: There is no dispute, your Honor, about [284] these two documents upon which Mr. Decker relies.

The Court: The legal inferences to be drawn from it or legal conclusions to be drawn, of course, I understand there is a real argument about that.

Mr. Murray: I am not at all sure there is.

The Court: All right, then what is your position? Do you mean by that——

Mr. Murray: I am prepared to have your Honor enter your conclusions and findings of fact in accordance with the concession made by Mr. Decker. We do not oppose the amendment.

The Court: That answers it. The amendment—that is, the permission will be granted—the motion will be granted and the proposed amendment—now, do you have the original proposed amendment?

Mr. Decker: Yes, I do.

The Court: Now, Mr. Decker, will you file it?

(Counsel filing with the Court.)

Mr. Decker: I also have an order for your signature allowing me to file same.

The Court: That's what I want to know. Now, does this mean that perhaps—what about findings and conclusions now in this respect? Is this a matter that we are going to have to prepare findings and enter them or are findings in this respect going to be waived, in that respect, or do you want to go up and test this on appeal? [285]

Mr. Murray: No.

The Court: Well, all I want to do is have a record. Now, I have declared——

I want to ask you, Mr. Decker, and you, Mr. Murray, while you are here if you want some opportunity to propose additional findings or something of that sort, if you have a problem that you think I haven't found on. I think I have found on everything that was there and maybe more than was necessary. But, as I understand the rule, I held that my opinion or memorandum would constitute the findings and conclusions of the Court without further findings and conclusions. Have I left anything out?

Mr. Decker: No, your Honor. I have nothing further to propose.

The Court: I hesitate to take these cases away from counsel on findings, but in this case I thought it was so clearcut I didn't see anything that was missed. Now, from your point of view, if you think there should be additional findings that are material to frame the question, I would hear you, but I don't think there is anything additional. And insofar as the interest is concerned, if you waive findings, why, then we can have a judgment prepared and dispose of the matter very quickly. So that if you have further proceedings, you can have them.

Mr. Murray: We have no additional findings to propose at this time, your Honor. [286]

Mr. Decker: I think, your Honor, in view of the fact that you did expressly leave open the question of the finding on the issue of interest, that it might be appropriate for the Court to make a finding on that question, and I have the proposed find-

ings prepared and they have been submitted to counsel and he has indicated he has no objection to them.

The Court: All right.

Mr. Decker: So I will——

The Court: This is April 14th——

Mr. Murray: Your Honor, this is unnecessary, I would suppose, but I think the record should clearly show that our discussion today concerns only the question of propriety of the allowance of interest.

The Court: That's correct.

Mr. Murray: There is nothing in these findings by which we waive our position in regard to the findings, your Honor, upon the ultimate issue of liability.

The Court: The record will so show. If there is any way in which you want to have a written record to portray that, I will be perfectly happy to do that, to make such an entry, but I am sure Mr. Decker will not take any advantage of the situation.

Mr. Decker: No. So far as the plaintiff is concerned, the only thing that is before the Court today is the issue of interest. [287]

The Court: Interest. All right.

You will waive notice of the findings on this issue, will you not?

Mr. Murray: Yes, your Honor.

The Court: Then the findings will be entered. The findings of fact and conclusion of law on the issue of interest will be entered as of today.

Now, then, do you have a form of judgment or will you prepare a form of judgment for me, then?

Mr. Decker: I have one here this morning, your Honor.

The Court: Have you had a chance to examine it?

Mr. Murray: No.

Mr. Decker: I have not served it upon counsel.

The Court: Give counsel a chance to examine it. I don't mean you have to pass on it now, Mr. Murray. If you want time, I will give you that or whatever is necessary. Or if you can do it now, I will dispose of the matter. Here are the findings.

Mr. Murray: I think, your Honor, I would prefer to look at the judgment.

The Court: You may do so.

Mr. Murray: And examine it, on the understanding that if I find it is satisfactory, we can have your Honor sign it without a further hearing.

The Court: That's correct. That's the way. Have it [288] presented *ex parte* with your approval. You or counsel can advise me and I will sign it *ex parte*, because in this case there is no computation of money. This is all admitted. The only problem is the issue of law upon which the judgment is based and, as I say, this is a matter on which you, if you have any further proceedings, I want the record protected.

All right, gentlemen. If there is nothing further to come before the Court, we will recess.

[Endorsed]: Filed June 5, 1961. [289]

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1960

Aug. 29—Filed petition for removal from Superior Court, City and County of San Francisco, with complaint and summons.

Aug. 29—Filed bond on removal in sum, \$250.00.

Aug. 29—Filed cost bond of non-resident plaintiff.

Aug. 29—Filed notice by defendant of filing transcript on removal.

* * *

Oct. 11—Filed answer of defendant.

Oct. 13—Filed demand by plaintiff for jury trial.

Dec. 6—Filed notice & motion by plttf. to set, Dec. 12, 1960, with certificate of readiness.

* * *

Dec. 19—Ordered case for trial Feb. 20, 1961. (Harris.)

* * *

1961

Mar. 13—Ordered case for trial March 20, 1961. (Burke.)

Mar. 13—Filed deposition of Arnold Harrington.

Mar. 13—Filed deposition of Joyce A. Harrington.

* * *

Mar. 20—Ordered case assigned to Judge Carter for trial this date. (Burke.)

1961

- Mar. 20—Court trial. Jury waived, opening statements made, trial briefs ordered filed, and further trial continued to March 21, 1961. (Carter.)
- Mar. 21—Further court trial. Evidence and exhibits introduced and further trial continued to March 22, 1961. Motion of defendant to dismiss, submitted. (Carter.)
- Mar. 22—Further court trial. Arguments heard and case submitted. (Carter.)
- Mar. 31—Filed memo. opinion for plaintiff in amount claimed, subject to determination of question of interest. Opinion to serve as findings & conclusions. Prevailing counsel to prepare judgment. (Carter.)
- Mar. 31—Mailed copies to counsel.
- Apr. 3—Filed trial brief of N. Y. Life Ins. Co.
- Apr. 3—Filed memo. of plaintiff.
- Apr. 12—Filed stip. of counsel for hearing motion of plttf. to amend complaint, April 14, 1961, at 9:30 a.m.
- Apr. 12—Filed motion of plttf. for leave to amend complaint.
- Apr. 14—Ordered after hearing, motion to amend complaint granted and formal judgment submitted. (Carter.)
- Apr. 14—Filed order granting leave to file amended complaint. (Carter.)
- Apr. 14—Filed amendment to Complaint.
- Apr. 14—Filed findings of fact and conclusions of law on issue of interest. (Carter.)

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Apr. 21—Entered judgment—filed April 20, 1961—
for plaintiff v. New York Life Ins. Co.
in sum, \$15,000.00, with 7% interest from
Feb. 16, 1960, until paid, and costs.

Apr. 21—Mailed notices.

Apr. 24—Filed memo. of costs by plttf.

Apr. 26—Costs taxed, \$68.81. (Clerk.)

Apr. 28—Filed notice of appeal by N. Y. Life In-
surance Co.

Apr. 28—Filed supersedeas bond in sum, \$17,-
000.00. “* * * approved this 28th day of
April, 1961, to stand as a supersedeas
until the final determination of the ap-
peal. /s/ Oliver J. Carter, United States
District Judge.”

Apr. 28—Filed order that all proceedings for en-
forcement of judgment be stayed pending
determination of appeal and the coming
down to this Court of the mandate of the
U. S. Court of Appeals for the 9th Cir-
cuit. (Carter.)

* * *

May 18—Filed appellant's designation of record on
appeal.

June 5—Filed reporter's transcript of trial pro-
ceedings.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by counsel for the appellant:

Excerpt from Docket Entries.

Petition for Removal with copy of complaint and summons attached.

Removal Bond.

Bond for Costs of non-resident defendant.

Notice to Plaintiff of Filing Petition and Bond on Removal.

Certificate of Service and Filing to State Court and Plaintiff.

Stipulation and Order Extending Time for Defendant to Plead.

Stipulation and Order Extending Time for Defendant to Plead.

Answer of New York Life Insurance Company.

Demand by Plaintiff for Jury Trial.

Notice and Motion by Plaintiff to set for Jury Trial.

Stipulation and Order continuing motion to set.

Stipulation and Order continuing motion to set.

Notice by Defendant of filing Depositions of Joyce A. Harrington and Arnold Harrington.

Memorandum of Court for Judgment.

Stipulation for Hearing on Motion to Amend Complaint.

Motion of Plaintiff for Leave to Amend Complaint.

Order Granting Plaintiff Leave to Amend Complaint.

Amendment of Complaint.

Findings of Fact and Conclusions of Law on Issue of Interest.

Judgment.

Notice by Plaintiff of Taxing Costs, with Cost Bill attached.

Notice of Appeal by Defendant.

Order Granting Supersedeas.

Supersedeas Bond.

Certificate of Service of Order Granting Supersedeas.

Designation of Record on Appeal.

Deposition of Arnold Harrington (Plaintiff's Exhibit 6).

Deposition of Joyce A. Harrington.

Reporter's Transcript of Trial Proceedings.

Plaintiff's Exhibits 1, 2, 3, 4, 5 and 7.

Defendant's Exhibits A-1, A-2, A-3, A-4, B-1, B-2, B-3, B-4, B-5 and B-6, C-1, C-2 and C-3.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of June, 1961.

[Seal] JAMES P. WELSH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 17398. United States Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Joyce A. Harrington, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed June 7, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17398

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

To Appellee Joyce A. Harrington and to Her Attorneys, Allan Brotsky and Charles W. Decker:

Pursuant to the provisions of Rule 17 (6) of the Rules of the Court of Appeals for the Ninth Circuit, appellant designates the following as the points upon which it intends to rely in this appeal:

(a) That the death of Arnold Harrington did not result directly and independently of all other causes from accidental bodily injury within the meaning of the double indemnity provisions of policies 25452964 and 26027201.

(b) That the District Court erred in its finding that at the time of his injury, Arnold Harrington thought that the safety lever of the gun with which he fired the fatal shot was in a safe position and that the gun would not fire in that condition.

(c) That the District Court erred in its finding that at the time of his injury, Arnold Harrington

thought that the gun with which he fired the fatal shot could be safely pointed at his head.

(d) That the District Court erred in its finding that the fact that the safety lever of the gun was in the fire position at the time of firing was a condition unknown to and unexpected by Arnold Harrington.

(e) That the District Court erred in its finding that Arnold Harrington had no intention to take his own life.

(f) That the District Court erred in its finding and conclusion that the death of Arnold Harrington did not result from suicide.

(g) That the District Court erred in its conclusion that the death of Arnold Harrington resulted directly from accidental bodily injury.

(h) That the District Court erred in applying an improper standard in determining the applicable substantive law upon the question whether the death of Arnold Harrington resulted directly and independently of all other causes from accidental bodily injury; and that, in that connection, the District Court failed and declined to follow decisions of the Supreme Court of California and other decisions which are directly controlling upon that question.

(i) That the District Court erred in applying an improper standard to determine the hazardousness of the conduct of Arnold Harrington by holding in that connection that the hazardousness of

such conduct is to be judged not by the objective standard of foreseeability to the ordinary prudent man, but by the subjective standard of the state of mind of Arnold Harrington.

(j) That the District Court erred in admitting into evidence, over appropriate objection, the self-serving and hearsay testimony of Mrs. Harrington concerning alleged statements of Arnold Harrington made immediately prior to his injury, including statements to the effect that Mrs. Harrington need not worry because the safety of the gun with which he fired the fatal shot was on safe and that Mr. Harrington would “prove” to her that it was on safe.

(k) That the District Court erred in admitting into evidence, over appropriate objection, the self-serving and hearsay opinions and conclusions of Mrs. Harrington concerning Arnold Harrington’s alleged display of annoyance immediately prior to the fatal shooting because of her alleged lack of confidence in him.

(l) That the District Court erred in admitting into evidence, over appropriate objection, the self-serving and hearsay opinions and conclusions of Mrs. Harrington to the effect that immediately after his injury, Mr. Harrington allegedly looked at her with great surprise upon his face and allegedly threw up his hands as he fell to the floor.

(m) That the District Court erred in admitting into evidence, over appropriate objection, the hearsay testimony of witness James F. Swinfard con-

cerning the opinions and conclusions of Mrs. Harrington allegedly expressed to him on the evening of February 5, 1960, including statements to the effect that Mr. Harrington had just shot himself, but that he didn't mean it.

(n) That the District Court erred in denying defendant's motion at the close of plaintiff's evidence to dismiss the action and enter judgment for defendant under the provisions of Rule 41 (b) of the Federal Rules of Civil Procedure upon the ground that upon the facts and the law plaintiff had shown no right to relief.

(o) That the evidence does not support the findings of the District Court.

(p) That the evidence and the findings do not support the conclusions of the District Court.

(q) That the evidence, the findings, and the conclusions do not support the judgment of the District Court.

Dated: June 13, 1961.

/s/ MORRIS M. DOYLE,

/s/ RICHARD MURRAY,

McCUTCHEN, DOYLE,

BROWN & ENERSEN,

Attorneys for Appellant New York Life Insurance
Company.

Certificate of Service by Mail attached.

[Endorsed]: Filed June 15, 1961.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated, by and between the parties hereto, that none of the exhibits identified or introduced in evidence upon the trial of the action need be printed and that the court may consider those exhibits in their original form.

Dated: June 13, 1961.

MORRIS M. DOYLE,
RICHARD MURRAY,
McCUTCHEN, DOYLE,
BROWN & ENERSEN,
Attorneys for Appellant;

By /s/ RICHARD MURRAY.

ALLAN BROTSKY,
CHARLES W. DECKER,
Attorneys for Appellee.

By /s/ CHARLES W. DECKER.

So Ordered June 15, 1961.

/s/ RICHARD H. CHAMBERS,
Circuit Judge.

[Endorsed]: Filed June 15, 1961.